

THE
CALCUTTA LAW JOURNAL.
REPORTS OF CASES
DECIDED BY THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL ON APPEALS
FROM INDIA
AND
BY THE HIGH COURT OF JUDICATURE.
AT FORT WILLIAM IN BENGAL.

Vol. XXIII.

1916.

CALCUTTA :
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THE CALCUTTA LAW JOURNAL.

1916.

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**THE
CALCUTTA LAW JOURNAL.**

**SHORT NOTES OF CASES, ARTICLES
AND OTHER MATTERS.**

Vol. XXIII.

1916.

**CALCUTTA :
CALCUTTA LAW JOURNAL OFFICE.
7, Old Post Office Street.**

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The Calcutta Law Journal

Reports.

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PRIVY COUNCIL.

PRESENT :—*Lord Atkinson, Sir George Farwell, Sir John Edge
and Mr. Ameer Ali.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

BAI RAJBAL

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY].

*Cession—Enforceable rights after cession—Burden of Proof—Viramgam Kasbati's
Tenure—Patta—Bombay Act VI of 1862—Bombay Act VI of 1888.*

After a cession of territory to British rule the only enforceable rights against the sovereign are those conferred by him after the cession either by agreement express or implied or by legislation. An implied agreement conferring rights may be established by evidence of recognition of rights existing before cession and of an election express or implied to be bound by them.

Semle; The burden of establishing the existence of an enforceable right is upon the subject : *Cook v. Sprigg* (1) ; and *The Secretary of State for India v. Kamachee Boye Sahaba* (2) followed.

Kasbati of the village of Chharodi in pargana Viramgam, *held*, upon the facts, to have no proprietary right in the village and not to be legally entitled at the end of the term of his patta to have a fresh patta granted to him. The pattas granted from time to time were in the nature of leases and were not merely jamabandi pattas.

Bombay Act VI of 1862 does not apply to Kasbatis and a Kasbati's rights under Bombay Act VI of 1888 are subject to and limited by his patta.

The Secretary of State for India v. Bai Rajbai (3) reversed.

(1) (1898) L. R. (1899) A. C. 572. (2) (1859) 7 M. I. A. 476, (540 & 541).

(3) (1911) 13 Bom. L. R. 609.

P. C.
1915.
April, 16, 20, 21, 23
and
June, 3.

P. C.

1915.

The Secretary of
State for India in
Council

v.
Bai Rajbai.

The respondent Bai Rajbai and Bai Nandbai brought the suit against the Secretary of State for India for a declaration that they were entitled to hold possession and management of the village Chharodi and to enjoy the profits thereof, and for an injunction restraining the defendant or his servants from interfering with their possession and management except for the purpose of levying the jama which they were bound to pay. Nandbai died during the course of the litigation and was then represented by Rajbai. They alleged that the village was given to their ancestors by the Mahomedan rulers of Gujarat and had been in their possession ever since, that at the time of the advent of the British in 1818 their ancestor was in the possession and enjoyment of three villages including Chharodi and in 1822-23 he gave up two villages and was allowed to retain possession of Chharodi as proprietor thereof, that after the death of the last two male holders of the village it descended to them as their heirs under the Mahomedan law, but the Government had served on them a notice of ejectment on the 27th January 1898, and that they were talukdars and could not be ejected though liable to pay the jama.

The Government in their defence contended that the last male-holders of the village were in possession thereof under a lease, dated the 22nd December 1879, for a term of 8 years, which term had already expired and the plaintiffs had no right to keep possession of the village.

The plaintiffs in reply pleaded that the said male-holders signed the lease set up under compulsion. The Government thereupon withdrew the defence based on the said lease, and pleaded that "the village in suit became the property of the Government in 1822 or earlier either by cession or conquest," and that the "plaintiffs' claim is estopped as their ancestors kept from time to time the disputed village from Government by virtue of leases of a short duration ever since from the commencement of the British administration in this Taluka, i. e., from the year 1822-23."

The District Judge decreed the suit holding that the plaintiffs were proprietors. At the end of his judgment he summed up his findings as follows :—

(1) The history of the settlement of 1823 leads to no other conclusion than that the villages left to the plaintiffs' ancestors were intended to be kept by them permanently though it was open to the Government to revise the jama.

(2) The patta (in Exhibit 143) so far as it contained any words capable of a different meaning was a nullity : *Balvant v. Secretary of State* (1).

(3) Mr. Cruikshank in 1825 and Mr. Rogers in 1851 classed the plaintiffs' ancestors among Talukdars.

(4) Numerous other officers also addressed them as Talukdars.

(5) Even the President in Council in 1862 referred to one of the Viramgam Kasbatis as a Talukdar.

(6) The incidents of the tenure were those of a Talukdari one. The plaintiffs' ancestors' lands descended from father to son, and the jama was a percentage of the assessment. Mr. Peile says that the Kasbatis were allowed 30 per cent. The owners also mortgaged their lands and decrees were obtained against them as if they were private property.

(7) In the Government registers the plaintiffs' lands were never entered as Khalsa. They were entered as Kasbati to distinguish them from Gameti and not because they were not held on a Talukdari tenure.

(8) Mr. Peile's statements and maps show the Kasbatis villages as Talukdari.

(9) As these villages were Talukdari, Bombay Act VI of 1862 was applicable to them and Bombay Act VI of 1888 is expressly applicable to them.

(10) The plaintiffs have been in possession certainly since 1823 and the onus being on the defendant to show that he can eject them, that onus has not been discharged.

The Government appealed to the High Court, which held that the arrangement made by Mr. Williamson in 1822-23 was permanent, and consequently the plaintiff could not be ejected, but that she did not hold the village unconditionally. To ascertain these conditions the case was sent down to the District Judge, who held that the conditions sought to be imposed were all provided for by statute. When the case again came before the High Court it was held that certain conditions should be incorporated in the decree. The decree of the District Court was consequently varied. For a full report see *Secretary of State for India v. Bai Rajbai* (2), where the conditions as well as some of the important documents are set out.

Both parties then appealed to His Majesty in Council, the Government contending that the sole surviving plaintiff was liable to

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(1) (1905) I. L. R. 29 Bom. 480.

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ejection as the village was always held under a lease, and that even if she were entitled to hold the village, the conditions imposed by the High Court should be varied, particularly the condition relating to the devolution of the property in suit. The plaintiff contended that she was entitled to hold without any conditions.

Sir Erle Richards, K. C. and *Lowndes*, for the Appellant :—Whatever rights the respondent's predecessors had in the village in suit the Government is not bound to recognise them, even though those rights might have been safeguarded by the treaty of cession. Recession rights could not be enforced in municipal Courts: *Cook v. Sprigg* (1). The real question is, as rightly held by the High Court, what settlement was made after the cession. Mr. Williamson made the settlement in 1822-23 in pursuance whereof a lease was given to the Kasbatis, who have all along since then held the village under leases, which were renewed by the Government from time to time. The Government were not bound to renew the leases, but they did so as a matter of favour. They are now desirous of resuming the village, and the Kasbatis as lessees are estopped from denying the title of the Government as lessor: Indian Evidence Act, s. 116. A 'patta' always means a lease, and in construing it, only the terms thereof must be looked at: *Balkishen Das v. Legge* (2). The terms of the pattas show that they were leases, and the Kasbatis could hold during their currency only, and on the expiry of a lease they would be holding at the will of the Government. Reference was made to Mr. Peile's Report, Selections of the Records of the Bombay Government, No. 106 New Series, Ed. 1867, pp. 3, 9, 10, 12, 14, 25 and 36-41; and the Transfer of Property Act, s. 105.

Bombay Act VI of 1862 does not apply to the Kasbatis, who are not talukdars. Under s. 20 thereof after the expiry of the period of management of the estate of a talukdar taken over under the Act, his estate is made absolute. Chharodi was never brought under that Act, and by s. 34 of the Bombay Act VI of 1888, Act VI of 1862, could not be applied to the estate of any talukdar. These Acts do not confer any rights. Reference was also made to Bombay Act VI of 1888, ss. 2, 26 et seq and 34.

If the High Court are right in holding that the arrangement made with the Kasbatis in 1822-23 was permanent, but subject to conditions, the Government contend that there should be a condition confining the succession to the village to the male line. They

(1) (1898) L. R. (1899) A. C. 572 (578).

(2) (1859) L. R. 27 I. A. 58; I. L. R. 22 All. 149.

are, however, willing that the respondent may hold but the succession should not go to any one who is not a Kasbati.

[Lord Atkinson :—We have nothing to do with that ; all we are concerned with is the question of the legal right. If the notice of ejectment is good the action fails, and if bad, the respondent remains in possession].

De Gruyther, K. C. and J. M. Parikh, for the Respondent : In India except in Oudh there has been no general confiscation of pre-British rights, which have been always recognised by the Government after cession. In Oudh confiscation took place by a proclamation, but no proclamation is shown to have been issued in this paragana at the time of the cession in 1817.

Mr. Williamson's report on the Kasbati's pre-British rights is not correct. We contend that we were proprietors and that our proprietary rights were recognised by the British Government after the cession when the first settlement was made with us after cession in 1817. At that time settlements were made annually, and there was every year a settlement with us of all the 17 villages from 1817 to 1822-23, when seven years' settlements were introduced by Mr. Elphinstone, who laid down that a proprietor was entitled to 20 per cent. of the income of the village as profits. When Mr. Williamson made the settlement of nine villages, the jama thereon was reduced so as to allow us the 20 per cent. profits on the resumed 8 villages. This shows that the Government had recognised our proprietary rights in all the seventeen villages, otherwise they would never have allowed the Kasbatis 20 per cent. profits on the resumed villages as well. The settlement for seven years in 1822-23 was a general settlement in the district and pattas were given to all including the *Garasias* who admittedly are proprietors to-day. They also had similar pattas from time to time, and if they are proprietors, the Kasbatis are also proprietors. Moreover, the *pattas* are not as already shown, the root of the title of the Kasbatis. The clause in the *patta* of 1823 "you make the village prosperous and hand it over to Government in Samwat 1887" was inserted by mistake, which were recognised afterwards, and for that reason, it was never put in any subsequent *pattas*. Both Courts have come to the conclusion that the arrangement made by Williamson was permanent. The *pattas* are not leases, but they are mere settlement arrangements. In introducing the bill which subsequently became Bombay Act VI of 1862, the President of the Council the Governor admitted that the taluqdars were proprietors, and taluqdars included the Kasbatis inasmuch as he was referring

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to the terms of the *patta* of Lea one of the nine villages of the present Kasbatis. The preamble of Act VI of 1862 "is notoriously contrary to historical truth." *Waghela Rajsanji v. Shekh Masludin*(1). Mr. Peile's report that the Kasbatis are lease-holders is, as shown by the District Judge, wrong. The Kasbatis have been in lawful possession since 1822 and it is for the Government to show that they are lessees. They pay the land revenue immediately to the Government and on more than one occasion the village has passed from ancestor to heir, and consequently their village is an estate of inheritance, though *pattas* were renewed from time to time: *The Collector of Trichinopoly v. Lekhamani*(2), and *Kooldeep Narain Singh v. The Government*(3). When there was an attachment of the village from 1845 to 1849 the Government gave the Kasbatis 20 per cent. of the income as profits, and whenever there has been any talk of an attachment, the Government have always said that they would take over the management and allow the Kasbatis 20 per cent. of the income as their profits. That also shows that the Kasbatis had proprietary rights in the village. The *pattas* were merely *jamabandi* *pattas*, and that is why different conditions and amounts of jama are found in them. The last *patta* was given in 1865 after the statement of the Government in 1862 that the talukdars were proprietors. In that *patta* the Governor gives all their rights to the Kasbatis. The conditions found in previous *pattas* are all omitted in this. It is merely a *jamabandi patta*, and the rights of the parties should be determined by that *patta*. In the lists of talukdars prepared by Mr. Peile the names of the Kasbatis are included. They have always been treated as talukdars. Reference was also made to Official Writings of Mont-stuart Elphinstone, edited by G. W. Forrest, pp. 469-70, 480-82, 484; Selections from the Records of the Bombay Government, No. 106 New Series, (Peile's Report), ed. 1867, pp. 36-41, and the list of Talukdars attached thereto. The policy of Bombay Act VI of 1862 seems to be to declare the encumbered talukdars proprietors after the expiry of the period of the management by the Government of their estates. That would mean that the Government intended to put those talukdars who were not in debt in a worse position. That Act was passed only for a special object. From 1862 forward the Government intended to treat and has treated all unincumbered talukdars as proprietors. It is on this

(1) (1887) L. R. 14 I. A. 89 (91); I. L. R. 11 Bom. 551.

(2) (1874) L. R. 1 I. A. 282 (308 & 313); 14 B. L. R. 115.

(3) (1871) 14 Moore's I. A. 247 (256).

hypothesis that Bombay Act VI of 1888 was passed wherein Kasbatis are included amongst the talukdars. Section 33 of that Act applies to them the Bombay Land Revenue Code (Bombay Act V of 1879) and s. 73 of the latter Act gives all occupants a heritable and transferable right save as otherwise prescribed by law. Even therefore if the Kasbatis had not such rights before, Bombay Act VI of 1888 gives them those rights: Reference was made to Bombay Regulation XVII of 1827; Bombay Act VI of 1862, preamble and s. 20; and Bombay Act VI of 1888, preamble and sections 1, 2(1), 4, 5, 10, 22, 23, 24, 31 and 33.

Sir Erle Richards, K.C., in reply: S. 73 of Act V of 1879 must be read with s. 56 thereof, and when so read the right of occupancy, if any, is for the period for which the Kasbati's holding is limited. Acts VI of 1888 and V of 1879 create no title. Reference was also made to Act VI of 1888, sections 31 and 33, and Act V of 1879, sections 3, 68 and 73. What the President in Council said in introducing the bill cannot be referred to in construing Act VI of 1862: *Administrator General of Bengal v. Prem Lal Mullick* (1).

The judgment of their Lordships was delivered by

Lord Atkinson:—These are consolidated appeals from preliminary and final decrees of the High Court of Judicature of Bombay, dated respectively the 16th of April 1909, and 11th of April 1911, modifying a decree of the District Judge of Ahmedabad, dated the 30th of November 1907, in suit No. 7 of 1898 in his Court.

The question in issue in the action for an injunction, out of which these appeals have arisen, is whether the plaintiff, like her male ancestors, is not entitled to the continued possession, management, and enjoyment of a certain village called Chharodi, about 2,200 acres in extent, situated in the Pargana Viramgam, in the district of Ahmedabad in the province of Gujarat. In her plaint she bases her right on her absolute ownership of this village. In argument before this Board and in the judgments of the Courts below her right has been also based apparently upon the following title, namely this, that though her ancestors took from time to time several leases of this village from the Bombay Government, each for a term of years, they were not, as the appellant contends, mere lessees bound to give up to their lessors at the end of each term the possession of the demised village; but were legally entitled, as each lease terminated, to have a new lease granted to the last lessee or his representative. Either title, if possessed by her, would

(1) (1895) L. R. 22 I. A. 107; I. L. R. 22 Calc. 788.

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enable her to succeed in this action. In order to arrive at a conclusion on the issue thus in dispute between the parties it is necessary to examine briefly the history of this district of Ahmedabad before its cession by the Gaekwar, with the concurrence of the Peishwa, to the British Government in the year 1817, and to examine more in detail the dealings of the Bombay Government after that date with a certain class of its inhabitants, Mahomedans in religion, said to have originally come from Delhi under the Great Mogul, and styled indifferently Casbatees and Kasbatis, and especially their dealings with the ancestors of the respondent, who belonged to that class, touching this village of Chharodi.

The ancestor of the respondent in possession of this village at the time of this cession was one Jehangirbhai *alias* Bapuji. One Fatumyia, his grandson, died in the year 1891 childless, leaving him surviving his widow, Nandbai, one of the plaintiffs in the action, who has died during the course of the litigation. One Bapuji, the brother of Fatumyia, died some years ago, leaving his son, Bapabhai, his only issue him surviving, and Bapabhai himself died in the year 1893, leaving his daughter, Bai Rajbai, the other plaintiff, his only child him surviving. This lady, who subsequently married and was left a widow, has thus become the sole surviving descendant of the member of the Kasbatis class who was in possession of this village of Chharodi at the date of the aforesaid cession. The term Kasbatis, it is not disputed, was used to designate dwellers in towns whose lands were cultivated not directly by themselves but by raiyots, to whom they let them, receiving therefor a rent in cash or in kind. They were, in addition, apparently invested with certain powers of government over their villages, including the management of village affairs. At the time of the cession the Kasbatis were possessed of 17 villages within the Pargana of which Chharodi was one. The settlement of the territories ceded was not practically undertaken till the year 1822-1823.

In the interval an accredited public official of the Company was put in charge, duly authorised to investigate the local conditions, and make suggestions and recommendations for the carrying through of this work. In the conduct of this business and in discharge of these duties he made reports to his superiors in which he sketched the history of the Kasbatis, the Grassias, and other classes or families amongst the inhabitants, and purported to describe the rights they had theretofore respectively acquired as against the ceding Sovereign, the Gaekwar, to the land of which they were in possession, and the villages over which they exercised some primitive powers

of management and control. Some of these reports have been received in evidence apparently without objection. On two of them, sent by Mr. Williamson, described as the Assistant Collector in charge, the first bearing date the 3rd of August 1822, to the Secretary of the Government of Bombay, and the second bearing date the 28th of May 1823, referring to the first, to the Collector of Ahmedabad, much reliance has, naturally, been placed. In the first he reports, amongst other things, that there were 17 villages in the Viramgam pargana, held for a considerable number of years by several families of Casbatees or Kasbatis under a peculiar kind of tenure; that their possession had been frequently interrupted, and had not therefore been sufficiently continuous to found prescriptive rights; that as soldiers of some property, family, and character, they had acquired a partial influence in the affairs of the pargana, and often had obtained from the local managers leases of villages on favourable terms, in the granting of which nothing further had been intended than that the villages should remain in their temporary charge; that after the grant of the farm of Ahmedabad by the Peishwa to the Gaekwar, the Kasbatis had enjoyed the produce of some of these villages for 25 or 30 years on a revenue which was increased or lowered according to the pleasure of the local managers; that in 1804 they were dispossessed of these latter by one Babaji Appaji, a manager of the Peishwa, who demanded a higher jumma than the Kasbatis would consent to pay, but were restored to possession ten years later; that thus by a train of circumstances of such an undefined nature that it was difficult to describe them, the class had acquired a sort of claim to the villages of which they were found in possession when the country was delivered to the Bombay Government; that since the authority of that Government had been established at Ahmedabad revenue settlements had been made with them, except where they refused to pay an adequate jumma, "but being men of ignorance or bad circumstances and of very indolent habits," they were altogether incompetent to conduct village concerns; that their villages were of vast extent and capable of much improvement; that they were well aware of the precarious tenure by which they held their villages (as they were merely what might be called leaseholders), and that he had every reason to believe they would be well satisfied with an arrangement which would secure to them permanent possession of a portion of their villages.

Mr. Williamson then proposed for the consideration of the

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Government a plan to this effect : to give to each Casbatee one, or according to the circumstances and claim of the particular person, two, of the smaller villages on a jumma less than that which they had hitherto paid, thereby keeping up their name and respectability as landowners, and enabling them to devote their whole attention to cultivating and improving their properties, while the small amount of revenue levied on the villages remaining in their hands would compensate them for the loss of those surrendered to the Government.

This plan was not approved of by the Government. On the contrary, the Government Secretary wrote to the assistant in charge of the Collectorate of Ahmedabad (presumably this same Mr. Williamson, as he so described himself) a letter bearing date the 22nd of November 1822, acknowledging the receipt of the latter's letter of the 3rd of August previous, and informing him that though the plan he suggested might be agreeable to the Casbatees, the Governor in Council doubted whether it would afford any permanent relief; that it was considered that a more desirable arrangement would be to give to the Casbatees pensions, to be fixed by the Government, for a life or a number of lives, but that if these latter should be unwilling to accept pensions Mr. Williamson's plan should be adopted. The Casbatees refused to accept pensions, but Mr. Williamson's plan, though adopted in part, was not adopted in its entirety. One of its provisions of vital bearing on the present controversy was not adhered to. He had suggested that the Kasbatis should be secured in permanent possession of such of their seventeen villages as should be left to them. Whereas on the 28th of May 1823 he wrote to the Collector of Ahmedabad informing him that he (Williamson) "had concluded an arrangement with the Casbatees of Viramgam by which they are to retain, during the pleasure of the Government, nine of the villages found under their management when the Pargana fell into our possession."

He proceeded to point out that by this arrangement the interference of the Casbatees would be removed from eight of their villages, the produce of which was valued at 13,800 rupees, while that of those remaining with them was only valued at 5,300 rupees, but that the jumma in respect of these latter was so small, namely, 1,925 rupees, that there would remain for their maintenance 3,375 rupees, a sum differing but little from that of 3,820 rupees, which, according to his calculation, was all that would have been available for their maintenance had they continued in possession of their seventeen villages. Then follows this passage :—

"The lease being granted for seven years affords the Kasbatees an opportunity of availing themselves of these capabilities (*i.e.*, the capabilities of their villages of improvement). The condition of the villages and the rules respecting leases laid down by Government guided me in fixing the term."

On the 23rd of June 1823 the Secretary of the Government of Bombay wrote to the Collector of Ahmedabad informing him that the Governor in Council approved of Mr. Williamson having made an—

"agreement with the Kasbatees by which they are to retain during the pleasure of Government nine of the villages found under their management when the Parganna fell into our possession."

The expression "at the pleasure of Government" is not very happily chosen. Since leases for terms of seven years were to be given to the Kasbatis, it obviously could not have meant that they were to hold these nine villages merely as tenants at will of the Government. What it must, in their Lordships' view, have meant in this connection was that they should receive at once leases for a term of seven years, and that after the termination of these leases the Government would be free to deal with them as it pleased, to renew their leases or to permit them to continue in possession without leases, or to dispossess them altogether, as the Government might in its discretion think fit. If that be so, then there could not have been on the part of the Government a more emphatic assertion of their resolve that the lessees should not have any legal right, as against it, to a renewal of their leases or the permanent possession of their villages.

Before dealing with the action which the Government of Bombay took in reference to this village of Chharodi on receipt of these reports it is essential to consider what was the precise relation in which the Kasbatis stood to the Bombay Government the moment the cession of their territory took effect, and what were the legal rights enforceable in the tribunals of their new Sovereign, of which they were thereafter possessed. The relation in which they stood to their native Sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant matters. They could not carry in under the new *regime* the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new Sovereign were those, and only those, which that new Sovereign, by agreement expressed or implied, or by legislation, chose to confer upon them. Of course this implied agreement

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might be proved by circumstantial evidence, such as the mode of dealing with them which the new Sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new Sovereign has recognised these anti-cession rights of the Kasbatis, and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights become relevant subjects for inquiry in this case. This principle is well established, though it scarcely seems to have been kept steadily in view in the lower Courts in the present case. It is only necessary to refer to two authorities on the point, namely, the case of *The Secretary of State for India v. Kama-chee Boye Sahaba* (1) decided in the year 1859, and *Cook v. Sprigg* (2) decided in the year 1899.

In the first this Board had to deal with the action of the East India Company in seizing in exercise of their Sovereign power, in trust for the British Government, the Raja of Tanjore, and the whole property of the deceased Rajah, as an escheat, on the ground that, by reason of the failure of the male heirs of the latter the dignity of the Raj was extinct, and that the property of the Rajah had thereby lapsed to the British Government. Lord Kingsdown, delivering the judgment of the Board, is, at page 540, reported to have expressed himself thus :—

"The result, in their Lordships' opinion, is that the property now claimed by the respondent has been seized by the British Government, acting as a Sovereign power, through its delegate the East India Company, and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction. Of the propriety or justice of that act neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that if a wrong has been done it is a wrong for which no municipal Court of justice can afford a remedy."

Now, in that case the act complained of was of a tortious character.

In the second case the Judicial Committee had to deal with a concession given by the ceding Sovereign, the paramount chief of Pongoland. The appellants sought to enforce in a Court of law

(1) (1859) 7 M. I. A. 476.

(2) (1899) A. C. 572.

their rights under this concession against the English Government to which the territory over which the concession had been given was ceded by this chief. The decision in the first-mentioned case was followed, the above quoted passage from the judgment of Lord Kingsdown approved of, and it was held that the annexation of territory was an act of State, and that any obligation assumed under a treaty either to the ceding Sovereign or to individuals is not one which municipal Courts are authorised to enforce. As far, therefore, as the legal rights of the Kasbatis, enforceable against the Indian Government in Indian Courts, are concerned, the above-mentioned cession of territory must be taken as a new point of departure. Mr. Williamson's conclusions as to the positions, rights, and interests of the Kasbatis may have been quite erroneous. The Kasbatis may have been absolute owners of their villages, as the respondent contends, and yet the consideration of their ante-cession rights is beside the point, save so far as it can be shown that the Bombay Government consented to their continuing to enjoy those rights under its own *regime*.

In their Lordships' view, putting aside legislation for the moment, the burden of proving that the Bombay Government did so consent to any, and if so, to what extent, rests, in this case, upon the respondent. The Kasbatis were not in a position in 1822 to reject Williamson's proposal, however they might have disliked it, or to stand upon their ancient rights. Those rights had for all the purposes of litigation ceased to exist, and the only choice, in point of law, left to them was to accept his terms or be dispossessed. There is nothing, therefore, to support the contention that they never would have accepted Williamson's terms had the permanent possession of their villages not been promised to them. It may well be that the Bombay Government did not intend to disturb them, and even intended, if all things went well, to grant to them, as acts of grace, new leases as the old leases expired, and it may also well be that the Kasbatis fully believed and trusted that this would be done, as indeed for many years it was done. From these facts, if they existed, moral obligations (with which this Board is not concerned) may arise, but the mere repetition of such acts of grace cannot *per se* create legal right to their continuance.

Though notice was served on the two plaintiffs to produce all documents in their possession touching the issues raised in the suit, no *putta* or *kabulyat* executed in 1823, was produced or given in evidence, but two Government records of that year were produced as secondary evidence of the contents of a *putta* then granted to

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the Kasbatis then in possession of the nine villages retained by them, including this village of Chharodi. According to these records a putta of the village was then given to Bapabhai, the father of Fatumyia, for a term of seven years, at a jamabandi of 100 rupees, with a covenant by the lessee that he should not sell or mortgage the village, or give, or allow anyone to give, any land of the village in Pasayta, or keep any debt upon the village, but should make it prosperous, and should hand it over to the Government in the year 1831. If these be the true contents of the putta they absolutely negative the existence of any legal right enforceable in an Indian tribunal, either to have the leases of the village from time to time renewed, or to continue in possession of it after the leases had expired.

As to this village of Chharodi, one must start then on the inquiry as to what rights were granted by the Bombay Government to the respondent's ancestors, with this admitted fact, that in the sixty-eight years which had elapsed between the year 1822 and the institution of this present suit, not even in one of the several puttas granted to them is any provision to be found to the effect, that upon its expiration a new putta is to be granted to the lessees or their representatives or successors, while the very first of these puttas contained a clause expressly negating the existence of such a right. The reasonable and proper inference to be drawn from the silence of the puttas on this important point is, Sir Erle Richards, on behalf of the appellants, contends, that the legal right to obtain renewals of the puttas was never conferred upon the respondent's ancestors. And, no doubt, if the draftsmen of these instruments had even a rudimentary knowledge of their business, one would have expected that such an important matter as that would have been provided for, but, unfortunately for this contention, those experts have drawn these instruments in language so obscure that the instruments could scarcely have been more obscure had obscurity been aimed at, and have resolutely omitted from every putta but the first the ordinary provision to be found in every properly-drawn lease, that the lessee shall deliver up possession at the end of the term. Mr De Gruyther, on behalf of the respondent, on his side not unnaturally contends that the inference to be drawn from the continued omission of such a provision is that the lessees had a legal right to continue in possession after the putta, or lease, had terminated. He puts forward, moreover, as their Lordships understood him, this additional contention, namely, that in 1822 a settlement was made with the ancestor of the respondent then in

possession of this village of Chharodi, in which the amount of the jumma was fixed, that the effect of such a settlement is that the person in possession by whom the jumma is to be paid, was fixed or settled permanently in the possession, at all events, of this village, with a right to manage it, that the puttass could not have been designed to take away the rights thus conferred, and that the only way of reconciling the grant of them with the relation created by the settlement is to hold that the putta only dealt with the jumma and the mode of management of the village, not with the tenure of it, if that term may be used. To determine which, if any, of these contentions is well founded, it is necessary to examine in detail the provisions of those puttass the contents of which are satisfactorily proved.

First, then, as to the puttass granted on the 31st August 1833. In the year 1827, during the currency of the first lease a report was made to the Talukdari settlement officer by Lieutenant Melville, of the 7th Regiment, in which he described the Kasbatis of Viramgam as proprietors of certain villages. He apparently was not aware that they then actually held under puttass for terms of years granted to them by the Bombay Government. No importance can therefore be attached to his use of the word "proprietors." In July 1831 the question of the increase of the jumma fixed by the first batch of leases was under consideration. Several Kasbatis presented a petition to the Government insisting that the jumma fixed in 1822 was then fixed permanently, and should not be increased, also asserting that it was part of the arrangement made by Williamson that the eight villages taken from them in the first instance should, at the end of the seven years, be restored to them, and claiming that this arrangement should be carried into effect. The reply of the Government to this petition, dated 16th September 1831, was to the effect that the order made by the Government on the 16th of November 1822 could not be set aside. Sometime thereafter the above-mentioned lease was granted to Bapabhai, the father of Patumyia, and his brother, Miabhai, as the lessees. It is endorsed as having been delivered to the latter. The jumma is increased to 142 rupees, payable in eight instalments, at different times, and in unequal amounts. The term is seven years, commencing in the year 1830-31 and terminating in the year 1836-37.

By the second clause of the lease it is provided that on failure to pay any instalment on the day named, the Government are to "take back" the putta, and cause the revenue of the village to be collected by other hands, the lessees being responsible for any

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deficit in the year in which the putta is taken over, and that at the end of that particular year the Government "would if it so pleases give the village to some person other than the lessees who it was asserted shall not get it" but should be held liable for any loss which might accrue to the Government during the remainder of the term.

The seventeenth clause provides that if the Government should find that the lessees were spoiling the village, or did not abide by the clauses of the lease, the Government would send arbitrators to inquire into the matter, and if they should find that the village would be spoiled if allowed to remain in the hands of the lessees the putta would be taken back from them, and they would have to pay such a penalty as the Government might choose to impose.

The facts that the granting of a putta for seven years was part of the arrangement made with Mr. Williamson, and that the putta then granted contained a clause that the village should be given up to the Government at the end of the term, coupled with the clauses of the lease of 1833, providing for the transfer of the village in certain events to persons other than the lessees, are quite destructive of the theory that these puttass merely regulated the amount of the jumma but not the tenure, and that independently of them altogether this family of Kasbatis was fixed in permanent possession of this village of Chharodi. In the year 1838 a new putta was apparently granted for seven years, but neither the original nor any copy of it was forthcoming at the trial. On the expiration of this term in the year 1845, the Collector forwarded to the Revenue Commission of Ahmedabad a report, dated the 8th September 1845, proposing, amongst other things, to increase the jumma of this village. In it he sets forth in paragraph 5 that the Kasbatis being sent for in order to enter into a fresh settlement, declared that the settlement made by Mr. Williamson was permanent and that the jumma was not to be increased. They were unwilling to take leases, on any terms other than the original. The Collector thereupon refused to renew the leases and limited the privileges of the Kasbatis to the receipt of 20 per cent. on the revenue pending the pleasure of Government. In the 10th paragraph of the report he proceeds to add:

"This long enjoyment of the villages at the same rental has increased their (*i.e.*, the Kasbatis) real or feigned impression that the original settlement was permanent, which it certainly was not." He then proposed that the rent of the villages should be slightly increased, and that if the Kasbatis did not accept the leases offered,

the villages should continue under the direct management of the Government, and the Kasbatis should be allowed 20 per cent. of the revenue.

It will be observed that both parties to this dispute took their stand respectively on Mr. Williamson's arrangement. They only differed as to its terms. The Kasbatis insisted that according to it the eight villages taken from them were to be restored to them at the end of the term of the first lease, and that the rent should not be increased, while the Government insisted that the grant of any lease after the first was entirely a matter at their discretion.

The Government refused to yield. The position they took up clearly appears from a letter dated 24th February 1847, addressed by the direction of the Governor in Council to the Revenue Commissioner of this district, Mr. A. Blane, pointing out that the Casbates did not appear from the former proceedings connected with the settlements previously made with them to have any valid title to "a permanent continuance of the terms upon which they have hitherto held their villages," and suggesting that the jumma should be increased by 5 per cent., that if they consented to this their term might be renewed for seven years, but that the Governor in Council desired that a distinct reservation should be inserted in the new lease endorsing the right of the Government to raise the rent if circumstances should show it to be expedient, and that if they refused to consent to this the villages should be retained under Government management, an allowance being made to the Kasbatis during pleasure to an amount equal to the profit which Mr. Williamson settled would have been left them. There could scarcely be an assertion more absolute than this of the power of the Government to alter the terms of any leases they might make to the Kasbatis as they themselves should deem fit, to give or withhold such leases at will, and to dispossess the Kasbatis and take the management of these villages into Government hands.

The existence, however, in the Bombay Government of the power and right which they assert in this letter of the 24th of February 1847, belonged to them, is equally inconsistent with the existence in the respondent or her ancestors either of the absolute ownership of this village or of the right to have the leases of it perpetually renewed. The Government terms were ultimately accepted, and a new putta of the village, bearing date the 4th of September 1849, was granted to Fatumyia and Bapuji, his brother (the respondent's grandfather), to hold for a term of seven years from (1844-45) to (1850-51) at the increased yearly rent of rupees 144-1-9, payable by five instal-

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ments on the days therein named. The lease is executed by the lessees. It will be found at p. 68 of the Record. Had not the draftsman of this instrument been, like his predecessor, almost enamoured of obscurity, one would have expected that he would have laid at rest all matters of dispute on this point by simply inserting in this lease the proper and usual provision that at its termination the lessees would deliver up possession of the demised premises to the lessor. Through ignorance or carelessness he resolutely abstained from doing this. He did, however, insert some clauses which merit attention. It is provided, first, that if the instalments of the rent be not paid when due, attachment will be levied on the village by the Government, and "the management" will be carried on, presumably, by the Government. Secondly, that the lessees shall not alienate or pledge the village or the land composing it to anyone. Thirdly, that the lease was granted out of kind consideration for the lessees' maintenance, that they, the lessees, should therefore make good arrangements for the prevention of crime in the village, or otherwise the (tharav) settlement would be cancelled. Fourthly, that if an attachment for arrears of rent were levied by the Collector, or if a creditor by an application to the Courts caused an attachment to issue against the village, the management of the village would be taken out of the hands of the lessees and carried on by the Government, the (tharav) settlements would be cancelled, and the whole income of the village to be taken charge of by the Government.

Then follows a clause, No. 10, inconsistent to some extent with the succeeding clause, No. 11, but evidently introduced to put an end for the future to all controversy touching the increase of the jumma. It provides that the village is given to the lessees on putta according to the settlement or agreement thereinbefore set out, that when the lease expired the lessees should hold charge of all income and produce of the village, and should agree to the payment of the amount of the revenue which the Government might fix, and that if they failed to pay this the income should be taken charge of by the Government. The eleventh clause provided that the village was given on putta to the lessees on the agreement thereinbefore set out, and that if they did not act accordingly to the agreement the putta should be void.

The existence of the statement that the putta was granted out of kind consideration for the maintenance of the lessees is due to this, that during the dispute about the increase of the rent, the two lessees and another person had presented a petition to the Revenue Com-

missioner stating that they were in very indigent circumstances, that attachments had gone out against their villages, and that they had not left in their houses corn for their sustenance or any wearing apparel.

If the evidence of the case stopped here it would, in face of this lease, in their Lordships' opinion, be quite impossible to contend that the putta merely fixed the amount of the rent, and that by the settlements the lessees or their ancestors had acquired as against the Bombay Government a right to the property in, or to the permanent possession of, this village of Charodi. The granting of a lease was part of the original settlement or agreement, and these leases are treated in several places as the instruments by which the estate or interest in the village is conveyed to the lessees.

This clause 10 is the only piece of written evidence produced, indicating even in the most remote way that the lessees were entitled at the end of each lease to have a renewal of it granted to them. *Prima facie* a lease for a term does not import any right to a renewal of it. On the contrary, it *prima facie* implies that the lessee's right to the premises demised ends with the term. In order that the respondent should succeed, therefore, on this point, she must find sufficient evidence, apart from legislation, of an agreement, express or implied, with the Bombay Government imposing on them a legal obligation to renew for all time, if required, these leases as they terminate, and conferring on each lessee the correlative legal right to demand that renewal. In their Lordships' view it would require something much more clear, plain, and explicit than this confused, and almost unintelligible clause, to be treated as, in effect, a covenant by the lessor for a perpetual renewal of the lease of this village.

No new putta was granted in 1851. The lessees continued to hold possession and to pay the rent till 1860. Fresh puttas for one year each were given in the years 1860 and 1861, at an increased rent of 160 rupees, and again from 1862 to 1865; between 1860 and 1870 yearly renewals appear to have been granted, the rent being sometimes increased. In the year 1874 there was a failure of issue in the case of the holders of two of the nine villages retained by the Kasbatis under Williamson's settlement, namely, the villages of Keela and Leah, or Lea. The said Fatumyia claimed the former village as the nearest collateral heir of the last holder. The Revenue Commissioner reported upon this matter to the Government of Bombay, and the Governor in Council passed a resolution, dated the 27th November 1874, by which it was declared that the tenure of the

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Kasbatis was merely leasehold, and that their villages lapsed to the Government on failure of heirs. He accordingly directed that this village of Keela should be resumed by the Government.

This direction was on the 5th of July 1877 approved of by the Secretary of State. But Fatumyia and Bapuji, unwilling to submit to this decision, instituted in the year 1878 a suit against the Secretary of State for India in Council claiming to be entitled to this village as heirs of the last holder, and they supported their claim by a document purporting to be a sanad granted by one of the Mogul Emperors some centuries earlier. The District Judge who heard the suit decided that this sanad was a forgery, and that the last holder, through whom the plaintiffs claimed, was a mere leaseholder, and dismissed the action with costs. The plaintiffs acquiesced in that decision. They never sought to question it in any Court of law. The question of the renewal of the leases of the Kasbati tenants was brought before the Government of Bombay about this time by the Revenue Commissioner, and a formal resolution was on the 25th of July 1877 passed by that Government to the effect that it appeared all the leases had expired, that there was no necessity to make any change, it being quite clear that the villages were held on leasehold tenure at the pleasure of the Government; that it was desirable to renew for periods of seven years the leases which had expired, a very slight nominal increase of rent being made in each case, to show that the Government maintained their rights and would continue so to do, and directed that words should be inserted in the new leases making this perfectly clear. This resolution was carried out. A form of lease in the English language was drawn up, and on the 7th of October 1878 approved of by the Bombay Government. It contained, amongst others, clauses restraining alienation and at last providing that on the termination or sooner determination of the lease, the lessee should, without objection or obstruction, yield up the village demised unless the Secretary of State in Council should then be pleased to renew the lease, and also a condition of re-entry on the breach of any of the provisions of the lease.

A lease in this form on the 22nd of December 1879 was granted to Fatumyia and Bapuji, the respondent's father. The kabulyat was signed by them, but, as they subsequently asserted that they did not sign the document of their own free will and pleasure, the appellant does not therefore desire to treat them as bound by it. It can only be looked at as containing a renewed expression of the view consistently entertained by the Government in reference to

the true position and rights of the Kasbatis. No further leases were granted. The lessees and those who succeeded them continued to pay the rent reserved, notice was served in 1898 upon the two ladies, Bai Nandbai and Bai Rajbai requiring them to quit and deliver up possession of the village of Chharodi on the 31st of July following. It was not disputed that if these ladies had by the continued payment of their rent become tenants of this village from year to year, this notice was adequate and sufficient to determine that tenancy. Up to this the evidence touching the administrative dealings of the Bombay Government and its accredited officials with the Kasbatis and their villages, including that of Chharodi, has alone been dealt with.

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Their Lordships are of opinion that the just and reasonable inferences to be drawn from it when properly considered are, that not only has the respondent failed to discharge the burden which, as already stated, rests upon her, but that the Bombay Government never departed from the position in which they were left by Mr. Williamson's arrangement; that they never by an agreement, express or implied, conferred upon the respondent or any of her ancestors the proprietary rights in, or ownership of, the village of Chharodi claimed by her; that they never recognised or admitted the existence of such rights, or of any rights analogous to them, in them or her; that the only rights in this village which the Government conferred upon her ancestors were those conferred by the leases which the Government from time to time, at their own will and pleasure, chose to grant to them (save such rights as are conferred by the creation of a tenancy from year to year in manner already mentioned); that this Government never conferred upon any of the lessees of the said village a legal right to insist, at the termination of his lease, upon a new lease of the village being granted to him; in other words, that the Bombay Government never were under any legal obligation to grant any lease of this village; and that the granting or withholding of a lease of it rested from the first solely in their discretion.

It was contended, however, on behalf of the respondent that her case is much strengthened by a consideration of the Bombay Government's dealings with the Grassias. They were ancient Rajpoot proprietors, and before the cession of the Ahmedabad Zilla, stood to their native sovereigns in that relation, their lands being cultivated by ryot tenants from year to year and at will. They and the Mewassies were clearly distinguishable from the Kasbatis. The last-named held their lands by contract, neither by sanad nor by

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defiance, and Colonel Walker, the first official appointed to deal with this district, was well aware that there was no analogy between the holdings of the Grassias and those of the Kasbatis. The word "Taluk" was first applied to these Rajpoot proprietors by the British themselves. Notwithstanding the ancient proprietary rights of the Grassias, they took leases of their lands from the Bombay Government, and thenceforward their legal rights were, in accordance with the principle laid down in the authorities already quoted, determined entirely by the contract which they had made with that Government, altogether irrespective of what their position and rights may have been before the cession of their territory.

All this is stated at length in the account by J. Peile, Talukdari Settlement Officer of the Talukdars of Ahmedabad Zilla, and the measures adopted for their restoration under and in connection with the Act VI of 1862 of the Bombay Legislature, published in 1867, pages 7, 9, 14, 42, 43—47, 64, and 67. Indeed, in the preamble of that Statute it is recited that these Talukdari estates are only held on leasehold tenure determinable at the pleasure of the Government. So that the case of the Grassias makes against the case of the respondent instead of in her favour, inasmuch as it shows clearly that after the cession of territory to a new Sovereign, when it comes to be a question of legal right the contract with the new Sovereign is conclusive and the rights against the old Sovereign avail nothing.

It only remains to consider the effect of any of the legislation of the Bombay Government on the question in issue on this appeal. Act VI of 1862, for the reasons given in the abovementioned publication of Mr. Peile, does not apply to Kasbati lessees at all. They never were talukdars of Ahmedabad in the true sense. They did not lose their ancient right of ownership of their land by taking leases, as did the Grassias, and therefore did not suffer the injustice which the Statute was designed to remedy. ^e

The Statute of 1888 is entitled an Act to provide for the revenue administration of estates held by superior landlords in the districts of Ahmedabad, &c. In the preamble it is recited that it is expedient to remove doubts as to the applicability of certain portions of the Bombay Land Revenue Code of 1879 to estates held by certain superior landlords in the above-mentioned districts, and to make special provision for the administration of the said estates and for the partition thereof. In the first section a Talukdar is defined to include "a thakur mewassies kasbati and naik." Section 23 provides that nothing in the Act shall be deemed to affect the validity of any

agreement entered into before the passing of the Act by or with a talukdar and still in force as to the amount of his jumma, nor of any settlement of the amount of jumma made by or under the orders of Government for a term of years and still in force. Every such agreement and settlement is to have effect as if the Act had not passed. And section 33 enacts that certain sections of the Bombay Land Revenue Code of 1879 are not to apply to the estates to which this Act applies. By section 33 it is also provided that the word "Talukdar" shall be substituted for the word "occupant," the words "registered Talukdar" for the words "registered occupant," and the words "Talukdars holding," or such words to that effect as the word occupancy when applying this Code of 1879 to the estates to which this Statute of 1888 applies. The seventy-third section of the Code provides that "the right of occupancy" shall, subject to the provisions contained in section 56, and to any conditions lawfully annexed to the occupancy, save as shall be otherwise prescribed, be deemed to be a hereditary and transferable property.

It is seriously contended, as their Lordships understood, that the effect of this substitution of the words "the right of occupancy" for the words "the right or interest of a Talukdar" in or to his holding, is that a Kasbati's interest in a leasehold held for a term of years is changed in its nature and becomes a hereditary and transferable property, notwithstanding that by the very conditions of the lease his interest is limited to a term, and he is restrained from alienation; and notwithstanding also that by section 68 of this Code it is enacted that an occupant is entitled to the use and occupation of his land for the period, if any, to which his occupancy is limited. These two sections, in their Lordships' view, plainly mean that a lessee, whether a true "Talukdar" or a "thakur," "mewassie," "Kasbati," or "naik," is bound by the terms of his lease, one term of which is that he shall only occupy for the term of years for which a lease for years is granted, and *prima facie* no longer. Section 73 was amended by the Act of 1901, but the amendment is immaterial on this point.

Their Lordships are clearly of opinion that these Statutes do not bear in any way on the issue raised in this case. They think that the decree of the High Court cannot be sustained, and that the decision of the District Judge is equally erroneous. The fallacy underlying the former on the point as to the right of the respondent to occupy permanently is clearly revealed in the passage printed at page 496 of the Record in which the High Court deals with the lease of 1833 :—

"There are no other provisions for forfeiture of the management.

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There is no provision for renewal of the putta, but it is to be inferred from the nature of the management and from the fact that the putta was for a term, that renewal was contemplated. This inference is supported by both previous and subsequent events; by previous events, because in 1823 permanent possession by the Kasbatis was contemplated; by subsequent events, because the renewal did, in fact, take place."

Their Lordships, dealing with the legal rights of the parties alone, are clearly of opinion that the decrees of both Courts are erroneous and should be reversed, that the main appeal, that of the Secretary of State, should be allowed, and the cross-appeal dismissed, and that judgment should be entered for the Secretary of State, dismissing the respondent's action. And they will humbly advise His Majesty accordingly.

The respondent must pay the costs here and below.

Solicitor, India Office :—Solicitor for the Appellant.

T. L. Wilson & Co. :—Solicitors for the Respondent.

J. M. P.

Appeal allowed and cross-appeal dismissed.

APPEAL FROM ORIGINAL CIVIL:

Before Sir Lancelot Sanderson, Kt., K. C., Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.

In re GOBERDHONE SEAL.

LAKHIPRIYA DASSEE

v.

RAI KISHORY DASI*.

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Security for costs—Appeal from insolvency order—Jurisdiction of appellate Court—Civil Procedure Code (Act V of 1908), Sec. 117, O. 41 R-10.—Presidency Town Insolvency Act (III of 1909), Sec. 8(b).

In an appeal against a judgment passed by the High Court in its insolvency jurisdiction, the appellate Court has power under section 117 and O. 41, R. 10 of the Code of Civil Procedure, to entertain and adjudicate an application by the respondent demanding security for costs from the appellant.

Sesha Ayyar v. Nagarathna (1) not followed.

* Application in *re* Appeal from Original Civil No. 61 of 1915 against the decision of Mr. Justice Chaudhuri.

(1) (1903) I. L. R. 27 Mad. 121; 13 M. L. J. 362.

Application by the creditor Rai Kishory Dasi.

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In re Goberdhone.

An application was made by Rai Kishory Dasi to the High Court in its original Insolvency Jurisdiction for a declaration that the transfers of his (Goberdhone Seal's) only property being his undivided share in his family dwelling house made by the insolvent on the 9th November, 1911, in favour of his wife Sarbo Sundari and then by her in favour of the appellant, Lakhipriya Dassee, who was the mother-in-law of one Gonesh Chunder Seal, a brother of the said insolvent, were colourable transaction and inoperative and void against the Official Assignee. The said Goberdhone Seal was adjudicated an insolvent on his own petition on the 27th February 1912. Mr. Justice Chaudhuri held that the sales to the wife, and by the wife to Lakhipriya were fictitious and therefore void against the Official Assignee. From this order Lakhipriya appealed. On appeal the respondent made this application for security for costs.

Messrs. N. Sircar and S. K. Chakravarty for the Appellant and Opposite Party.

Messrs. B. K. Lahiri and K. N. Majumdar for the Respondent and Applicant.

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The judgments of the Court were as follows :

Woodroffe, J.—This is an application for security for costs in an appeal against a judgment passed by Chaudhuri J. in Insolvency. It is unnecessary to recapitulate the facts which are set out in the petition. The application is opposed both on grounds of law and fact. As regards the first question, the point is whether O. 41, R. 10 applies to the case of an appeal from an order passed by a Judge in Insolvency under Act III of 1909. Section 8 (d) of that Act states that an appeal shall lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the ordinary Original Civil Jurisdiction. The question then is, does the order apply to the latter case. No doubt the case of *Sesha Ayyar v. Nagarathna* (1) answers this question in the negative. This case was decided prior to the present Code and has not been referred to nor followed so far as we are aware in this Court where the previous practice has been to entertain such applications. Under section 117 of the Code its provisions apply to the High Courts save as provided in parts IX and X. I am of opinion, therefore, that we have power to entertain and adjudicate this application under section 117 and O. 41, R. 10 of the Code. This conclusion is in conformity

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*In re Gobordhone**Woodroffe, J.*

with the previous practice under which such applications have been adjudicated. It cannot be reasonably held that this Court when sitting in appeal from a decision on the Original Side is deprived of powers necessary to an effective jurisdiction admittedly existent on the appellate side of the same Court. For, if O. 41, R. 10 does not apply, there is no other provision applicable, and in such a case it would be necessary to invoke the provisions of section 151. On the facts stated in the petition, and in particular on the findings of the learned Judge there stated, I am of opinion that security should be required of the appellant. The applicant is entitled to the costs of this application.

Sanderson C. J.—I agree.

Mookerjee J.—I agree.

Attorney for the Applicant : *Mr. J. N. Mitter.*

Attorney for the Opposite Party : *Mr. R. N. Chatterjee.*

A. T. M.

Application granted.

APPELLATE CIVIL.

*Be'ore Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice N. R. Chatterjee.*

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*August, 20, 24.
September, 2.
November, 24.*

MATHURA MOHAN SAHA AND OTHERS

v.

RAMKUMAR SAHA

AND

CHITTAGONG DISTRICT BOARD.*

Corporate body—Title to land, if passes by admission—Bengal Local Self-Government Act (III B. C. of 1885), section 138 (d), rules framed under—Rules 93, 98—‘Regulating the power,’ if includes regulating the mode of transfer—Immovable property vested in District Board, how to be transferred—Statute, construction of—Interpretation at the time of enactment—Rule 98 mandatory—Mandatory enactments, if and when directory—Suit, if liable to be dismissed—No title—Contract, when rescinded—Party, when can resile from the contract—Evidence—Corporation, if can retain money—Cross-objection—Appellant—Party affected—Civil Procedure Code (Act V of 1908), O. 41, Rr. 22 (3), 33—Limitation Act (IX of 1908), Sch. I, Art. 113.

* Appeals from Appellate Decrees Nos. 1243 (with cross-objections), 1979-81 of 1912, against the decisions of J. Phillimore Esq., District Judge of Chittagong, dated the 9th February 1912, modifying those of Babu Asutosh Banerjee, Subordinate Judge of Chittagong, dated the 28th November, 1910.

Title to land cannot pass by a mere admission when the statute requires a deed.

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Jadu Nath v. Rup Lal (1); *Dharam Chand v. Mauji Sahu* (2); and *Narak Lal v. Magoo Lal* (3) followed. *Hemendra v. Kumar* (4) distinguished.

Rule 98 of the statutory rules made by the Lieutenant-Governor under section 138(d) of the Bengal Local Self Government Act, is to be read along with Rule 93 and is mandatory and not directory. Hence no immovable property vested in a District Board can be validly sold except with the previous approval of the Local Government and except by an instrument under the common seal signed by the Chairman and by two members of the Board.

The expression 'regulating the power' in section 138(d) of the Bengal Local Self Government Act, when applied to a Rule made thereunder, is comprehensive enough to include not only rules which restrict the power of alienation to property of specified value and kind, but also rules which regulate the mode in which the alienation is to be effected. A power to regulate assumes the conservation of the thing which is to be made the subject of regulation.

Rules 93 and 98 made under section 138(d) are not *ultra vires*.

The Courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it, although such interpretation has not, by any means, a controlling effect upon the Courts and may be disregarded for cogent and persuasive reasons.

Baleswar v. Bhagirathi (5) referred to.

No universal rule for the construction of statutes can be laid down to determine whether a mandatory enactment shall be considered directory only, or obligatory with an implied nullification for disobedience; it is the duty of Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.

Howard v. Bodington (6) referred to. *Cole v. Greene* (7) distinguished.

Where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it is neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred. (*Caldow v. Pixell* (8) referred to). On the other hand, where a public duty is imposed and the statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions are intended to be directory only, when injustice or inconvenience to others, who have no control over those exercising the duty, would result, if such requirements were deemed essential and imperative. The test is, do the statutory prescriptions affect the performance of a duty or do they relate to a privilege or power?

(1) (1906) 4 C. L. J. 22; I. L. R. 33 Cal. 967.

(2) (1912) 16 C. L. J. 436.

(3) (1911) 22 C. L. J. 380.

(4) (1908) 12 C. W. N. 478.

(5) (1908) 7 C. L. J. 563; I. L. R. 35 Cal. 701 (713).

(6) (1877) 2 P. D. 211.

(7) (1843) 6 M. & G. 172

(8) (1877) 2 C. P. D. 562.

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When a public body or a company is established by statute or incorporated for special purposes only, and is altogether the creature of statute law, the prescriptions for its acts and contracts are imperative and essential to their validity.

Cases on the subject referred to.

A suit need not be dismissed, merely because the authority for its institution, such as a certificate under the Pensions Act, 1861, or section 78 of the Land Registration Act, or, section 60 of the Bengal Tenancy Act, or section 4 of the Succession Certificate Act, is not produced with the plaint. But it is otherwise, where the plaintiff had no title at all at the date of the institution of the suit.

Where there was an offer by the District Board to A to reconvey the land to him upon payment of Rs. 25 as actual expenses of acquisition, and the offer was accepted by him by a deposit of the amount, an enforceable contract was constituted. As the contract was for re-transfer of the land for Rs. 25, neither Rule 102 nor Rule 103, which applies respectively to contracts in excess of sums of Rs. 50 and Rs. 500, had any application.

The strict rule of the ancient Common Law was that a corporation could only act under its seal and was not bound by written contracts not under seal. This rule, however, was relaxed in many cases at an early date and where a corporation is acting within the scope of the legitimate purposes of its institution, even parol contracts made by its authorised agents raise implied promises, for the enforcement of which an action may well lie, specially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the corporation.

Lawford v. Bellaricay Rural Council (1); *Douglass v. Rhyl Urban District Council* (2); *Melbourne Banking Corporation v. Brougham* (3); and *Bank of Columbia v. Patteson* (4) referred to.

The exception based upon the doctrine of part performance cannot be applied where the contract is, by statutes, positively required to be under seal.

One contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former; but, if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together; where the new contract is consistent with the continuance of the former one, it has no effect unless or until it is performed.

Cases on the point referred to.

Where parties enter into a contract which, if valid, would have the effect, by implication, of rescinding a former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect by implication, of affecting their rights in respect to the former transaction.

Where one party, by acts and conduct, evinces an intention no longer to be bound by the contract, the other party will be justified in regarding himself as emancipated from continued liability under the contract.

A clear and precise evidence of a mutual intention to determine and abandon the contract is required by Court.

(1) (1903) 1 K. B. 772.

(3) (1878) 4 App. Cas. 156.

(2) (1913) 2 Ch. 407.

(4) (1813) 7 Cranch 599.

The demand of a return of the deposit is not by itself conclusive evidence of an intention to abandon the contract. But, where such demand is accompanied by other conduct consistent only with an intention to rescind, the vendee who has so acted cannot later on seek specific performance, for a non-existent contract cannot be specifically enforced.

A suit for specific performance of a contract is to be brought under Art. 113, Sch. I of the Limitation Act, within 3 years from the date when the performance is refused.

Where a corporation receives money or property under an agreement which turns out to be *ultra vires* or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation. (*Rankin v. Emigh* (1) referred to). The relief is granted, not upon the illegal contract, nor according to its terms, but on an implied contract of the corporation to return, or failing to do that, to make compensation for property or money which it has no right to retain; to maintain such an action is not to affirm but to disaffirm the illegal contract.

Central Transport Co. v. Pullman Palace Car Co. (2) referred to.

A respondent can urge cross-objection against another respondent, if he is a party affected. In this respect O. 41, R. 22 (3) of the Code of Civil Procedure has materially altered the law.

Appeals by the plaintiff and cross-objection by the Defendant in No. 1243.

Four suits for declaration of title by purchase and for recovery of possession and cross-suit by the defendant Ram Kumar Saha against the plaintiff purchaser and the Chairman of the District Board.

The material facts and arguments appear from the judgment.

The primary Court passed a decree for possession with mesne profits and costs against Ram Kumar Saha, and in the suit of Ram Kumar Saha a decree for certain amount was passed. Four appeals were then preferred by Ram Kumar Saha. The lower appellate Court confirmed the decree for money passed in his favour by the first Court and allowed the appeals and dismissed the suits for possession brought by the purchaser Ram Sundar Saha. The representatives of Ram Sundar, who died in the interval, then preferred four appeals to the High Court and Ram Kumar preferred a memorandum of cross-objections in the appeal which arose out of his suit.

Sir Rash Behary Ghose and *Babu Dharendra Lal Kastgir* for the Appellants.

Babus Mahendra Nath Ray and *Gunada Charan Sen* for the Saha Respondent.

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Babu Kshitish Chunder Sen for the District Board Respondent.

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The Judgment of the Court was delivered by

Mookerjee, J.—The history of the litigations, which have culminated in these appeals, consists principally of matters of record and has not formed the subject of controversy in the elaborate arguments addressed to this Court. In 1895, one Ram Kamal Saha, made over a sum of money to the District Board of Chittagong for the acquisition of a tract of land, in order that a tank might be excavated thereon for the benefit of the inhabitants of the locality. On the 15th June, 1897, the usual declaration was published under the Land Acquisition Act; the land was, in due course, delivered to and became vested in the District Board on the 11th and 21st February 1898. It subsequently transpired that Ram Kamal Saha, the donor, was not moved by motives of public philanthropy, but that his real object as also the object of Ramsundar Saha, now represented by the appellants, his three sons, was to spite his relation Ramkumar Saha (the respondent in these appeals) who was owner of a substantial portion of the property acquired. As Mr. Skrine, the then Commissioner of the Chittagong Division, observed, the country was honeycombed with tanks, and it was simply monstrous to wish to pull down godowns and buildings to excavate another tank. The result was that, on the 7th March 1898, the District Board decided to abandon the project; but as possession of the land acquired, had already been taken, the Government was not at liberty to withdraw from the acquisition under section 48(1) of Act I of 1894. The Bengal Government accordingly informed the Commissioner, on the 21st May, 1898, that the Government could not withdraw from the acquisition of the land at that stage, and forwarded the opinion of the Superintendent and Remembrancer of Legal Affairs, that if the Board did not want the land, they could arrange with the original owners or others to take the land off their hands at the price paid for its acquisition. On the 29th August, 1898, the Board intimated to Ramkumar Saha that as they had abandoned the project, it had become necessary to return the land to its original owner, and they enquired of him, whether he was willing to take back the land on payment of Rs. 25 as the expenses of acquisition. The owner, who was obviously anxious to get back the land, which he had lost by reason of what was essentially an unwarrantable misuse of the machinery provided in the Land Acquisition Act, deposited the amount in the Treasury on the 6th September, 1898. The Land Acquisition Collector, apparently in ignorance of

these proceedings, called upon Ramkumar Saha on the 16th December 1898, to receive Rs. 538-5-6 as compensation for that portion of his land which had been acquired for the benefit of the District Board. On the 10th January, 1899, Ramkumar Saha wrote to the Land Acquisition Collector and refused to take the compensation money on the ground that he had already accepted and acted upon the offer of the Board to retransfer the land to him on payment of Rs. 25. The sum held in deposit by the Land Acquisition Collector as compensation was subsequently made over by him to the District Board. The District Board, however, did not execute a conveyance in favour of Ramkumar Saha, and, so far as we can gather, the latter also did not press for a regular deed. The reason, no doubt, was that notwithstanding the proceedings for acquisition, he continued in actual occupation of the land. More than two years later, on the 27th November 1900, the Land Acquisition Collector intimated to Ramkumar Saha that Rs. 957-11-1 had been spent for acquisition of the land, that Rs. 538-5a-6p. which at one time, stood to his credit as owner of the land acquired, had been made over to the District Board, and that the land would be given to him on payment of the balance, Rs. 419-5a-7p. This offer, so far as can be made out from the record, covered not only the land of Ramkumar Saha which had been acquired for the District Board, but also other lands in the neighbourhood which had been acquired for the purposes of the same project of excavation of a tank. On the 4th December, 1900, Ramkumar Saha deposited in the Treasury the entire sum of Rs. 957-11a-1p.; and on or about the same date, a draft conveyance in his favour was drawn up on a stamped paper purchased at his cost for Rs. 10. The conveyance, however, for some unexplained reason, was neither executed nor registered. About a year later, on the 2nd August, 1901, the Bengal Government intimated to the Commissioner of the Chittagong Division that the land should be offered to the original owners at cost price, and that if they declined, it should be sold by public auction. The letter added that in either case, the net sale proceeds should be given to the donor or his personal representatives, who had paid the cost of acquisition. On the 24th February, 1902, the District Board issued a letter to Ramkumar Saha and informed him that if he did not, within thirty days, deposit Rs. 538-5-6 as price of the land and Rs. 13-9-6 as cost of acquisition (total Rs. 551-15-0) to take back his land, the land would be sold by public auction. Obviously, the District Board authorities overlooked that a much larger sum than what was demanded

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had already been deposited by Ramkumar Saha. The record does not show what reply was submitted by the latter. We know, however, that on the 20th October, 1902, the Land Acquisition Collector intimated to Ramkumar Saha and several other persons, (some of them apparently his superior landlords, and others his tenants) that they should on payment of Rs. 872-2-3 within 6th November, 1902, take back the land, and, that, otherwise, it would be sold by public auction. The notice explained, on the face of it, that the sum demanded was obtained by deduction of Rs. 118-9-9, that is, 15 per cent, from Rs. 990-12-0 (which was the cost of acquisition of the land in four parcels under four declarations; the respective amounts were Rs. 50-8-3, 36-11-0, 62-8-10, and 841-10-0). The record does not show what followed upon this notice; but, it is plain that the Land Acquisition Collector overlooked that a much larger sum than what he demanded had been deposited nearly two years before. The position now was that Ramkumar Saha did not get a title deed for the whole land, although he had fully complied with the requisitions of the District Board and of the Land Acquisition authorities. Meanwhile on the 17th May 1903, the Commissioner of Chittagong had asked permission of the Board of Revenue to restore the acquired land to the original owners. Why this was done is not explained, because we know that on two previous occasions, namely, on the 21st May, 1898 and on the 2nd August, 1901, the Local Government had, expressly or impliedly, approved the proposal for re-transfer of the land to the original owners; it is useless to speculate whether the letter of the 17th May, 1903, was written, because the previous correspondence and the orders contained therein were overlooked. The record shows, that on the 29th May, 1903, the Board of Revenue held that their sanction was not necessary, and that as the land had vested in the District Board, the latter were competent to effect the proposed re-transfer to the original owner. What action was taken by the District Board on receipt of this reply does not transpire from the evidence on the record; but we find that on the 24th March, 1904, Ramkumar Saha petitioned to the District Board for return of Rs. 992-11-1, which had been in deposit then for several years (the sum was made up of Rs. 25 paid on the 6th September, 1898, Rs. 10 paid on account of stamp on the 3rd December, 1900, and Rs. 957-11-1 deposited on the 4th December, 1900). No notice was taken of this application by the District Board authorities. Ramkumar Saha waited for three years and renewed his application on the 9th June, 1907, but with no better result. He again renewed his application

on the 12th August 1907. Upon this application, the Chairman of the District Board, on the 26th December 1907, directed that the sum might be refunded, because, in his opinion, the land should be retained and the tank constructed; he added in his note that the acceptance, of the refund by Ramkumar Saha would estop the latter in any claim on the unexecuted conveyance; and he specifically directed that the applicant might be asked to take the money. This instruction, however, was not carried out; the order of the Chairman was not notified to Ramkumar Saha, nor was the money ever paid or tendered to him, though an attempt is made in the oral evidence to show that a clerk of the District Board Office verbally communicated the substance of the order of the Chairman to an officer of Ramkumar Saha. The fact remains that the money is even now in the hands of the District Board authorities. On the 22nd February 1909, the District Board put up the land to auction. Ramkumar Saha, who was in occupation all this time, as soon as apprised of the intentions of the Board, appeared and objected to the sale on the ground that the Board had already contracted to sell the property to him. The objection was summarily overruled and the property was sold to Ramsundar Saha as the highest bidder for Rs. 1280. On the 14th May 1909, what is called a sale certificate was issued to the purchaser; as the property was not specifically described in this document, the Chairman of the District Board executed in favour of the purchaser a deed of release on the 12th July, 1909. Symbolical possession of the property is said to have been delivered to the purchaser on the 17th August, 1909; but he was not able to obtain actual possession. The result was that on the 28th September, 1909, the purchaser instituted four suits in the Court of the Munsiff of Chittagong for declaration of title by purchase and for recovery of possession from Ramkumar Saha; the District Board of Chittagong was not joined as a party defendant to these suits. The purchaser instituted four different suits, apparently on the ground that the land had been acquired in four distinct parcels on the basis of four declarations under the Land Acquisition Act. On the 16th December 1909, Ramkumar Saha instituted a cross suit in the Court of the Subordinate Judge of Chittagong, against Ramsundar Saha, the purchaser, and the Chairman of the District Board. This suit relates only to that portion of the land which had originally belonged to Ramkumar Saha. The plaint formulates the relief claimed as follows; *first*, that the title of the plaintiff in *Kaemi dartapa* right and right by adverse possession be declared; *secondly*, that the purchaser defendant be restrained

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in his attempt to take possession : *thirdly*, that the District Board be made to execute a conveyance in his favour and that his possession be confirmed ; *fourthly*, that he be awarded a decree for damages for Rs. 1957-11-1 with interest and costs ; *fifthly*, that he be granted such relief as the Court might think fit. Subsequently to the institution of this suit, the suits in the Court of the Munsiff were transferred to the Court of the Subordinate Judge, and the five suits were tried together. The Subordinate Judge, in the suit of Ramkumar Saha, allowed him a decree for Rs. 992-11-1 against the District Board, with interest thereon from date of judgment until payment. In the suits by Ramsundar Saha, the Subordinate Judge gave him a decree for possession with mesne profits and costs against Ramukmar Saha. Four appeals were then preferred to the District Judge by Ramkumar Saha ; namely, one appeal by him in his suit, and three appeals by him in three of the four other suits ; the lands comprised in these three suits were identical with what was comprised in his suit. Consequently, the subject matter of the controversy before the District Judge was restricted to that portion of the land, which originally belonged to Ramkumar Saha. The District Judge, in the suit of Ramkumar Saha modified, to his detriment, the decree of the primary Court. He confirmed the decree in his favour for Rs. 992-11-1 ; but he made the recovery of this sum from the District Board conditional on his making over possession of the land to the Board within 6 months. In the other three suits, brought by Ramsundar Saha, he allowed the appeals of Ramkumar Saha and dismissed the claim for possession on the ground that the sale of the 22nd February 1909 was inoperative in law. The representatives of Ramsundar Saha, who had died in the interval, have preferred four appeals to this Court and have contended that the sale mentioned was valid and operative. Ramkumar Saha has preferred a memorandum of cross-objections in the appeal which arises out of his suit and has argued that he had a good title to the land and was at any rate entitled to a decree for specific performance against the District Board. Notice of the memorandum of cross-objections was, however, served at first only on the appellants, and when this was brought to the notice of the Court, the hearing of the appeals was adjourned, at the request of the counsel for the District Board, to enable him to consider the position and to receive adequate instructions ; it was ultimately intimated to the Court that the District Board supported the contention of the appellants and opposed the cross-objections of their co-respondent, Ramkumar Saha. The appeals have been elaborately argued on

both sides, and the points which emerge for consideration as also the facts whereon they are based may be briefly summarised.

The land now in dispute admittedly belonged originally to Ramkumar Saha. At the instance of Ramkamal Saha and Ramsundar Saha, the land was acquired under the Land Acquisition Act and was vested in the Chittagong District Board for the excavation of a tank. The project was subsequently abandoned, and the District Board, with the concurrence of the Local Government, decided to return the land to the original owner on payment of the actual expenses of the acquisition, as no compensation had been previously paid to him. The District Board, through their Vice-Chairman, then made an offer to Ramkumar Saha to return the land to him, if he paid Rs. 25, as the expenses of acquisition. This offer was forthwith accepted, and the money was deposited in the Treasury. Though no formal conveyance was executed, Ramkumar Saha continued in occupation presumably on the strength of this agreement. Two years later, a second offer was made to Ramkumar Saha by the Land Acquisition Collector, on behalf of the District Board, to transfer to him the whole of the land acquired (inclusive of the land covered by the previous agreement) if he would pay Rs. 957-11-1 which had been assessed as compensation. This offer also was accepted, and the amount demanded was forthwith deposited. A draft conveyance was prepared, but was not executed for some unexplained reason. More than a year later, the District Board, through their Chairman, offered to Ramkumar Saha to retransfer to him his portion of the land on payment of Rs. 538-5-6, the amount assessed as compensation therefor, and Rs. 13-9-6, the proportionate amount of expenses of acquisition. A few months later, the Land Acquisition Collector, on behalf of the District Board, offered to retransfer the land to Ramkumar Saha, his landlords and his tenants, if Rs. 990-12-0 was paid. What took place on these offers, does not transpire from the record; but two years later, Ramkumar Saha petitioned for refund of his deposit; this was of no avail, and a renewed application three years later was equally fruitless. On a third application by him, some months later, the Chairman of the District Board directed a refund; but his order was neither communicated nor carried out. More than a year afterwards, notwithstanding protest by Ramkumar Saha, the District Board put up the land to auction, when it was purchased by Ramsundar Saha, who had, 11 years earlier, set the machinery of the Land Acquisition Act in motion to deprive his rival of the land in suit. The purchaser, however, was not able to obtain actual possession, and was obliged

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to sue for recovery of possession, with the result that a cross suit was instituted by Ramkumar Saha with a view to perfect his own title or to recover damages from the District Board. The outstanding features of the case, then, are, that Ramkumar Saha has never been paid any compensation for his land, and, has, on the other hand, paid to the District Board authorities, with a view to obtain a retransfer thereof, a sum of Rs. 992-11-1, of which the Board had enjoyed the benefit for 9 years at the date of the institution of the suit. The only question is, what are the legal rights of the parties ; for, there is not much room for doubt as to where the justice of the case lies. It is convenient to examine, at the outset, the position of Ramsundar Saha, who was the first to come into Court and to launch these litigations.

There is no controversy that under section 16 of Act I of 1894, the title vested absolutely in the District Board when possession of the land acquired was taken by the Collector on the 11th and 21st February, 1898. The question arises, whether that title has been subsequently transferred to Ramsundar Saha. The District Judge has held that the answer must be in the negative. The purchaser relied upon the sale certificate granted to him on the 14th May, 1909, and the release executed in his favour on the 12th July 1909 ; the Court of appeal below has held that neither is of any avail. Section 54 of the Transfer of Property Act provides that a sale of tangible immovable property of the value of Rs. 100 and upwards can be made, only by a registered instrument. The sale certificate was not registered and cannot consequently operate as a valid conveyance. The release was registered, but it does not purport to be a conveyance, and was stamped, not as a conveyance but as a release ; as stated on the face of it, it was granted, because the property covered by the sale-certificate was not described with sufficient precision in that document. A release of this character cannot operate to transfer title, because, as has been repeatedly ruled in this Court, title to land cannot pass by a mere admission when the statute requires a deed : *Jadu Nath v. Rup Lal* (1) ; *Dharam Chand v. Mauji Sahu* (2) ; *Narak Lal v. Magoq Lal* (3). The decision in *Hemendra Nath v. Kumar Nath* (4) [which at an earlier stage is reported in *Hemendra Nath v. Kumar Nath* (5)] is distinguishable ; there this Court held upon a construction of all the terms of the particular instrument that though called a deed of disclaimer it operated as a deed of transfer ;

(1) (1906) 4 C. L. J. 22 ; I. L. R. 33 Calc. 967 ; 10 C. W. N. 650.

(2) (1912) 16 C. L. J. 436.

(3) (1911) 22 C. L. J. 380.

(4) (1908) 12 C. W. N. 478.

(5) (1904) I. L. R. 32 Calc. 169 ; 9 C. W. N. 96.

the Court did not formulate any general proposition of universal application that a deed of release has always the same operation as a conveyance. But, even if the release in this case could, by any stretch of language, be construed as a conveyance, there would be a fatal objection to its validity. Neither the release nor the sale certificate fulfils the requirements of Rule 98 of the Statutory Rules made by the Lieutenant-Governor on the 15th December 1885 under section 138 (d) of Act III of 1885 B. C. (Bengal Local Self Government Act). Rule 98 is in these terms: "Every transfer of immovable property, vested in a Board, shall be made by an instrument under the Common Seal, signed by the Chairman and by two members of the Board, and, where these rules require the previous approval of the Commissioner of the Division, the fact that the transfer is signed with such approval shall be distinctly expressed." This rule must be read along with Rule 93, which, so far as relevant to the present matter, provides that "no immovable property vested in a District Board, shall, *except* with the previous approval of the Local Government and in such manner and on such terms and conditions as that Government may approve, be transferred by the Board by way of sale." The effect of these two rules, consequently, is that no immovable property vested in a District Board can be sold, *except* with the previous approval of the Local Government and *except* by an instrument under the Common Seal signed by the Chairman and by two Members of the Board. Neither the sale certificate nor the release fulfils this condition, as both the documents, though sealed and signed by the Chairman, were not signed by two Members of the Board. The appellants have sought to escape from this difficulty by a twofold argument, namely, *first*, that Rules 93 and 98 are *ultra vires*, and, *secondly*, that Rule 98, if *intra vires*, is directory and not mandatory.

In support of the first contention, reference has been made to sections 20 and 138(d) of Act III of 1885 B. C. The former section defines a District Board as a Body Corporate with power to acquire and hold property, both movable and immovable, and, subject to any rules made by the Lieutenant-Governor under the Act, to transfer any such property held by it and to contract and do all other things necessary for the purposes of the Act. A District Board has, consequently, power to transfer property held by it, subject to any rules made by the Lieutenant-Governor under the Act. Section 138 (d) authorises the Lieutenant-Governor to make rules consistent with the Act for the purpose of *regulating the powers*

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of District Boards to transfer property. The appellants have argued that this authorises the Lieutenant-Governor to frame rules which impose restrictions on alienations, but not to frame rules which prescribe the formalities to be observed when alienations are made. After careful consideration of the argument addressed to us, we are unable to accept this contention. The expression '*regulate the powers*', when applied to a rule, appears to us to be comprehensive enough to include, not only rules which restrict the power of alienation to property of specified value and kind, but also rules which regulate the mode in which the alienation is to be effected. It is conceivable, for instance, that the rules may prescribe that a District Board may sell land for one purpose and not for another, or that the sale can be made only with the assent of the Local Government when the value of the land exceeds a prescribed limit, or that the conveyance is, in certain cases, to be executed by the Chairman alone, while, in other cases, it is to be signed by the Chairman and a Member of the Board. Rules framed in this behalf may, without undue stretch of language, be deemed to be rules regulating the powers of the District Board. The term 'regulate' is defined as follows in the Oxford Dictionary, Vol. VIII, Page 379: "to control, govern or direct by rules or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings." Consequently, a rule to regulate a power may be a rule to restrict the exercise of the power as also a rule to guide the exercise of the power; though, as Lord Davey said in *Municipal Corporation of Toronto v. Virgo* (1) authority to regulate 'does not include a power to prevent or prohibit, because, in the language of Lord Watson in *A. G. v. A. G.* (2), a power to regulate assumes the conservation of the thing which is to be made the subject of regulation. Subject to this qualification, a rule framed for the purpose of regulating the power to transfer property may deal with the extent as also the mode of exercise of that power. In our opinion, Rules 93 and 98 are not *ultra vires*. In the interpretation of the scope of section 138(d), some stress may also be laid upon the circumstance that immediately after the enactment of the section by the Legislature, the construction now accepted by us was placed thereon by the authority charged with the duty of framing the rules. As was explained in *Baleswar v. Bhagirathi* (3), it is a well-settled principle of interpretation that Courts in construing a statute will give much weight to

(1) (1896) App. Cas. 88.

(2) (1896) App. Cas. 348.

(3) (1908) 7 C. L. J. 563; I. L. R. 35 Calc. 701 (713); 12 C. W. N. 657.

the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it, although such interpretation has not by any means a controlling effect upon the Courts and may be disregarded for cogent and persuasive reasons. We may add that if the contention of the appellants were to prevail, the object of the Legislature would obviously be defeated; instead of a simple and definite rule as to the mode in which transfers are to be effected, we would have here all the uncertainty which prevails in other systems of law as to the manner in which transfers may be validly effected by a corporate body.

In support of the second contention, namely, that Rule 98, if not *ultra vires*, is merely directory and not mandatory, it has been argued that the rule does not, by the use of negative words, expressly provide that a valid transfer can be effected in no other way, and reference has in this connection been made to the decisions in *Liverpool Borough Bank v. Turner* (1) and *Cole v. Greene* (2). In the first of these cases, it was ruled that although the Merchant Shipping Act, 1854, contains no provision negating the validity of a mortgage made otherwise than according to the terms of the Act, the whole scope of the Act is to that effect, and an equitable mortgage is consequently invalid. In the second case, it was ruled that a contract within the scope of section 151 of Stat. 3 and 4, Will. IV, Ch. 68 is not void though not signed "by the Commissioners, or by any three of them, or by their clerk" as prescribed by that section. In our opinion, the contention of the appellants is not well founded. Rule 98 must be read along with Rule 93, and the latter rule does use appropriate words to indicate that no immovable property vested in a District Board can be transferred by way of sale, *except* in such manner as the Local Government may approve. The intention is clearly manifest that a transfer shall not be made *except* in the manner prescribed by Rule 98. The whole aim and object of the law would plainly be defeated, if here the command to do the thing in a particular manner did not imply a prohibition to do it in any other; indeed, the language used in Rule 93 leaves no room for doubt as to the intention: *Jolly v. Hancock* (3); *Re Dickinson* (4). The decisions relied upon by the appellants are clearly of no avail. The observations of Lord Campbell, L. C. in *Liverpool Borough Bank v. Turner* (5), show that a transfer in a mode other than that

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(1) (1860) 1 John and Hem. 159; affirmed in (1860) 2 DeG. F. and J. 502 (507).

(2) (1843) 6 M. and G. 872 (890).

(3) (1852) 7 Exch. 820.

(4) (1882) 20 Ch. D. 315.

(5) (1860) 2 DeG. F. and J. 502.

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prescribed may be null and void, even though there are no negative words in the Statute declaring that all transfers in any other form shall be null and void. No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience; it is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed: *Howard v. Bodington* (1). The decision in *Cole v. Greene* (2), seems, at first sight, to assist the contention of the appellants, but on closer examination, turns out to be clearly distinguishable, as there the clause in question, according to strict grammatical construction, was held not to form part of the proviso; the judgment of Tindal, C. J. shows that if the latter part of the section could be treated as part of the proviso, it would have been deemed imperative and not directory only. Here, however, Rule 98, when read with Rule 93, shows that the requirement as to signature by two members of the Board is mandatory and not directory. This is shown also by an application of a useful test, namely, do the statutory prescriptions affect the performance of a duty or do they relate to a privilege or power. It is well settled that where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it is neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred: *Caldow v. Pixell* (3). On the other hand, where a public duty is imposed and the statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others, who have no control over those exercising the duty, would result, if such requirements were deemed essential and imperative. The distinction between the two classes of cases is illustrated by the decisions in *Ward v. Beck* (4); *Stapleton v. Haymen* (5); *The Andalusian* (6); *Le Fèvre v. Miller* (7); *Cope v. Thames Haven Ry. Co.* (8); *Diggle v. London and Blackwall Ry. Co.* (9); *Freud v. Dennett* (10); *Cornwall*

(1) (1877) 2 P. D. 211.

(2) (1843) 6 M. and G. 872.

(3) (1877) 2 C. P. D. 562.

(4) (1863) 13 C. B. N. S. 663; 134 R. R. 691

(5) (1864) 2 H. & C. 918; 133 R. R. 858;

(6) (1878) 3 P. D. 182.

(7) (1857) 8 E. & B. 321; 112 R. R. 582.

(8) (1849) 3 Exch. 841; 77 R. R. 859.

(9) (1850) 5 Exch. 442.

(10) (1858) 4 C. B. N. S. 576; 114 R. R. 859.

Mining Co. v. Bennett (1); *Irish Peat Co. v. Phillips* (2); *Bottomley's Case* (3); *Re Gifford & Bury* (4). These cases show that when a public body or a company is established by statute or incorporated, for special purposes only, and is altogether the creature of statute law, the prescriptions for its acts and contracts are imperative and essential to their validity. The case of *Freud v. Dennett* (5) is specially instructive. The Public Health Act, 1848, enacted that contracts exceeding £10 in value should be sealed with the seal of the Board; that they should contain certain particulars; and that every contract so entered into shall be binding; provided always that before contracting for the execution of any work, the Board shall obtain from the Surveyor a written estimate of the probable expense of executing it and keeping it in repair. The first of these requisites was decided to be imperative, and a contract unsealed was consequently held inoperative against the Board and the rates. But the provision which required an estimate, was held to be merely a direction or instruction for the guidance of the Board and not a condition precedent essential to the validity of the contract: *Hunt v. Wimblodon Local Board* (6); *Eaton v. Barker* (7); *Brooks v. Torquay* (8); *British Insulated Wire Co. v. Prescott* (9); *Nowell v. Worcester* (10); *Bonar v. Mitchell* (11). This meets completely the argument of the appellants that if any of the provisions of Rule 98 be deemed mandatory, the same character must be imputed to all its provisions. The view we take is supported by the principles deducible from the decisions in *Ashbury Ry. Co. v. Riche* (12); *Chasteauneuf v. Capeyron* (13) and *Young v. Mayor of Royal Leamington* (14). In the case last mentioned, the House of Lords ruled that section 174 of the Public Health Act, 1875, which enacts that every contract made by an urban authority, whereof the value or amount exceeds £50, shall be in writing and sealed with the common seal of such authority, is obligatory and not merely directory. Lord Bramwell observed: "the Legislature has made provisions for the protection of rate-payers,

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(1) (1860) 5 H & N. 423; 120 R. R. 670.

(2) (1861) 1 B. & S. 598; 124 R. R. 680.

(3) (1880) 16 Ch. D. 681.

(4) (1888) 20 Q. B. D. 268.

(5) (1858) 4 C. B. N. S. 576; 114 R. R. 859.

(6) (1878) 4 C. P. D. 48.

(7) (1881) 7 Q. B. D. 529.

(8) (1902) 1 K. B. 601.

(9) (1895) 2 Q. B. 463.

(10) (1854) 9 Exch. 457; 96 R. R. 793.

(11) (1850) 5 Exch. 415.

(12) (1875) 1 L. R. 7 H. L. 653.

(13) (1882) 7 App. Cas. 127.

(14) (1883) 8 App. Cas. 517.

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share-holders and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities, which involve deliberation and reflection. That is the importance of the seal. It is idle to say, there is no magic in a wafer. It continually happens that carelessness and indifference on the one side and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into. The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement." A similar view has been taken in a long line of cases in the Courts of the United States, where the principle has been repeatedly affirmed that if the charter or constituent act of a corporation prescribes a particular mode in which the property of the corporation shall be disposed of, that mode must be pursued: *Platter v. Elkhart County* (1); *Crow v. Warren County* (2); *Shimen v. Phillipsburg* (3). The point was discussed with characteristic clearness and striking logical force in able and interesting opinions by Field, C. J., in what are known as the City Slip cases in California, where it was ruled that sales of real estate belonging to the city by its officers, under the authority of an ordinance not adopted in accordance with statutory requirements, were void and did not pass title to the purchasers: *McCraken v. San Francisco* (4); *Grogan v. San Francisco* (5); *Pimental v. San Francisco* (6). There is thus no escape from the position that neither the sale certificate nor the release has operated to transfer title to the appellants.

It is further clear that they do not constitute even a valid contract for sale, because Rule 103 requires that every contract or agreement entered into by any District Board in respect of a sum or involving a value above Rs. 500 shall be sanctioned at a meeting, be in writing, be signed by the Chairman and two other Members of the District Board and shall be sealed with the Common Seal of such District Board. The rule adds that unless so sanctioned and executed, such contract shall not be binding on the District Board. It has been finally argued that the objection to the title of the appellants, should not have been allowed to prevail, as the sale was admitted (*Satyesh v. Dhunpul*) (7) and that, at any rate,

(1) (1885) 103 Ind. 360; 2 N. E. 544.

(2) (1888) 118 Ind. 51; 20 N. E. 642.

(3) (1896) 53 N. J. L. 306; 33 Atl. 852.

(4) (1860) 16 Cal. 591.

(5) (1861) 18 Cal. 590.

(6) (1863) 21 Cal. 351.

(7) (1896) I. L. R. 24 Calc. 20.

the trial should have been postponed to enable the appellants to complete their title by securing a duly executed instrument from the District Board : *Ganpat v. Adarji* (1). There is no force in either of these contentions. The appellants came into Court as plaintiffs and must succeed on proof of a valid title. Their title was challenged by the defendants, and though the factum of the sale by auction was admitted, it was asserted that the title had not been transferred thereby. The appellants had ample opportunity to produce a properly executed conveyance from the District Board, if they could, but they have not done so. The case before us clearly does not fall within the class of decisions where it has been ruled that a suit need not be dismissed, merely because the authority for its institution, such as a certificate under the Pensions Act, 1861, or section 78 of the Land Registration Act, or, section 60 of the Bengal Tenancy Act, or, section 4 of the Succession Certificate Act, is not produced with the plaint. The cases on this subject will be found reviewed in the judgment of this Court in *Sarat Chandra v. Apurba Krishna* (2) and need not be re-examined here. They are distinguishable, as the plaintiffs here had no title at all at the date of the institution of the suit. We hold accordingly that the District Judge has correctly found that Ramsundar Saha had no enforceable title at the date of the commencement of his suits, which must be deemed to have been rightly dismissed. The inference follows that the title to the land in dispute is still vested in the District Board, and, we must, consequently, examine the rights of Ramkumar Saha against that body, which form the subject of enquiry in his suit.

There is no controversy upon one fundamental point, namely, that after the land in dispute had become vested in the District Board, they abandoned the project to excavate a tank and obtained the sanction of the Local Government to retransfer the land to the original owner. The question is, whether there is a valid contract for such transfer enforceable at the instance of Ramkumar Saha, against the District Board. It cannot be disputed that there was an offer by the District Board to Ramkumar Saha on the 31st August, 1898, to re-convey the land to him upon payment of Rs. 25 as actual expenses of acquisition, and that the offer was accepted by him when he made the requisite deposit on the 6th September, 1898. This plainly constituted an enforceable contract. Rule 102 of the Statutory Rules provides that every contract made by or on behalf of a Board in respect of a sum or involving a value exceeding Rs. 50

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(1) (1877) L. L. R. 3 Bom. 312.

(2) (1911) 14 C. L. J. 55.

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shall be in writing and shall be signed by the Chairman or Vice-Chairman of the Board. As the contract in this case was for re-transfer of the land for Rs. 25, neither Rule 102 nor Rule 103, which apply respectively to contracts in excess of sums of Rs. 50 and Rs. 500, has consequently any application; but we know that the offer of the 31st August, 1898 was, as a matter of fact, signed by the Vice-Chairman. It has not been proved that the Vice-Chairman had no authority to make this particular offer; no copy of the rules, if any, framed by the District Board under section 32 (e) of the Bengal Local Self Government Act as to the powers to be exercised by the Chairman or Vice-Chairman, has been produced. We must assume that the Vice-Chairman was competent to make the offer, specially, as his act has never been specifically repudiated in these proceedings. The document whereby the original offer was made, is apparently not in existence, and the draft copy kept in the office has been produced; it is consequently impossible to say, whether the original bore the seal of the District Board; but, if a seal is necessary, it is to be presumed, as Lord Denman says in *Doe d. Pennington v. Tannire* (1) against the corporation that everything has been done that was necessary to make it a binding contract upon both parties. The statutory rules, however, do not expressly require that a contract of this description should be sealed. The omission to affix the seal would not, therefore, affect the validity of the contract. The strict rule of the ancient Common Law, no doubt, was that a corporation could only act under its seal and was not bound by written contracts not under seal. This rule, however, was relaxed in many cases at an early date, and where a corporation is acting within the scope of the legitimate purposes of its institution, even parol contracts made by its authorised agents raise implied promises, for the enforcement of which an action may well lie, specially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the corporation: 6 Vin. Abr. 267; 1 Wms. Saund. 615, 616; 1 Blackstone Com. 475; *Lawford v. Billericay Rural Council* (2); *Douglass v. Rhyl Urban District Council* (3); *Melbourne Banking Corporation v. Brougham* (4); *Bank of Columbia v. Patteson* (5). This is borne out by the statement of Fry in his classical treatise on Specific Performance of Contracts, 1911, section 648: "it appears

(1) (1848) 12 Q. B. 998 (1013).

(2) (1903) 1 K. B. 772.

(3) (1913) 2 Ch. 407.

(4) (1878) 4 App. Cas. 156.

(5) (1813) 7 Cranch, 299.

to be clear that such part performance as will prevent an ordinary defendant from setting up the defence of the Statute of Frauds, will prevent the defendant company from setting up either that defence or a defence grounded on the absence of the corporate seal or of the Statutory formalities in accordance with which the company may be enabled to contract. This was clearly laid down in the case of *Wilson v. West H. H. & Ry. Co.* (1) and there are other authorities leading to the same conclusion." Reference is then made to *Marshall v. Corporation of Quen Borough* (2); *Maxwell v. Dulwich College* (3) mentioned in *Carter v. Dean of Ely* (4); *London & Birmingham Ry. Co. v. Winter* (5); *Earl of Lindsey v. Great Northern Ry. Co.* (6); *Crook v Corporation of Stamford* (7); *Mayor of Drogheda v. Holmes* (8). Amongst more recent decisions, reference may usefully be made to the judgment of Neville J. in *Hoare v. Kingsbury Urban Council* (9) which shows that the exception based upon the doctrine of part performance cannot be applied where, as in *Frend v. Dennett* (10), and in *Young v. Royal Leamington Spa Corporation* (11), the contract is, by Statute, positively required to be under seal; to hold otherwise would in effect be, as Lindley, L. J. said *Young v. Corporation of Leamington* (12) to repeal the Act of Parliament and to deprive the rate-payers of that protection which Parliament intended to secure for them. In the case before us, however, the statutory rules do not render a seal necessary for the validity of this class of contracts, and the doctrine of part performance may well be applied; the District Board have had the benefit of the money paid by Ramkumar Saha and have allowed him to remain in occupation of the land and to incur expenditure thereon for many years on the basis of the contract. It is worthy of note that the contract in this case is not *ultra vires* in the sense that it is beyond the scope of the authority of the District Board as a Corporate Body under any circumstances; such contract is not affected by the class of decisions, whereof *Ashbury Ry. Co. v. Riche* (13) may be taken as the type. We hold accordingly that there was an enforceable contract on the 6th September, 1898.

(1) (1864) 34 Beav. 187; 2 DeG. J. & S. 475.

(2) (1823) 1 Sim & St. 520.

(3) (1783) 4 L. J. Ch. 138.

(4) (1835) 7 Sim. 211 (222); 40 R. R. 113 (121).

(5) (1840) Cr. & Ph. 57 (64).

(6) (1853) 10 Hare 664.

(7) (1870) L. R. 10 Eq. 678; L. R. 6 Ch. App. 551.

(8) (1855) 5 H. L. C. 460; 101 R. R. 251. (9) (1912) 2 Ch. 452.

(10) (1858) 4 C. B. N. S. 576; 5 L. T. 73; 114 R. R. 859.

(11) (1883) 8 App. Cas. 517. (522).

(12) (1882) 8 Q. B. D. 579 (585).

(13) (1875) L. R. 7 H. L. 653.

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Two questions next require consideration, namely; *first*, has there been an implied rescission of this contract by a substituted agreement, and, *secondly*, has there been an implied rescission of the contract by abandonment. As regards the first point, we have to bear in mind that, subsequent to the agreement of the 6th September, 1898, an offer was made to Ramkumr Shaha by the Collector on behalf of the District Board on the 27th November, 1900, to re-transfer the entire land to him (inclusive of the land acquired from him as also from others), if he would make the required deposit. He may be deemed to have accepted this offer on the 4th December, 1900, when he paid into the Treasury the amount demanded. What, then, was the legal effect of this transaction; did it amount to an implied rescission of the original agreement by a substituted agreement? The answer must be in the negative, *first*, because the second agreement was only more comprehensive than, but in no way inconsistent with, the first agreement, and *secondly*, because, the second agreement was inoperative in law.

As regards the first point, it is well settled that a contract need not be rescinded by an express agreement to that effect; if the parties make a new and independent agreement concerning the same matter, the latter may be construed to discharge the former, when the terms of the latter are so inconsistent with those of the former that they cannot stand together: *Gilbert v. Hall* (1). The true principle is that one contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former; but, if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together; where the new contract is consistent with the continuance of the former one, it has no effect unless or until it is performed: *Hunt v. South Eastern Ry. Co.* (2); *Dodd v. Churton* (3); *Patmore v. Colburn* (4); *Thornhill v. Neats* (5). The same view has been adopted in the Courts of the United States: *Drown v. Forrest* (6); *Rhoades v. Chesapeake Ry. Co.* (7); *McDaniels v. Robinson* (8). It is further well settled that where parties enter into a contract,

(1) (1831) 1 L. J. Ch. 15.

(2) (1875) 45 L. J. C. P. 87 (H. L.)

(3) (1897) 1 Q. B. 562.

(4) (1834) 1 Cr. M. & R. 65.

(5) (1860) 8 C. B. N. S. 831; 125 R. R. 902.

(6) (1891) 63 Vermont 557; 14 L. R. A. 80.

(7) (1901) 49 W. Va. 494; 87 Am. St. Rep. 826; 55 L. R. A. 170.

(8) (1854) 26 Vermont 316; 62 Am. Dec. 574.

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which, if valid, would have the effect, by implication, of rescinding a former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect to the former transaction. As observed by Willes, J. in *Noble v. Ward* (1), this is in accordance with a series of cases which will be found referred to in the second of the Egremont cases, *Doe d. Biddulph v. Poole* (2). A similar view was taken in *Britt v. Ayllet* (3). In the case before us, the second agreement was inoperative in law, as it contravened the provisions of Rule 103 of the statutory rules previously mentioned. We cannot, consequently, hold that the original agreement of the 31st August, 1898, was, by implication, rescinded by the subsequent agreement of the 4th December, 1900.

As regards the second point, we have to consider whether the agreement of the 6th September, 1898, was impliedly rescinded by abandonment, when Ramkumar Shaha applied to the District Board, on the 24th April, 1904, 9th June 1907 and 12th August, 1907 for return of the sum previously paid by him; for, there is no dispute that where one party, by acts and conducts, evinces an intention no longer to be bound by the contract, the other party will be justified in regarding himself as emancipated from continued liability under the contract. The rule on this subject was formulated by Lord Coleridge, C. J. in *Freeth v. Burr* (4): "Where the question is, whether the one party is set free by the action of the other, the real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which, I think, the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, namely, that the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." This exposition has been twice affirmed by the House of Lords. In *Mersey Steel & Iron Co. v. Naylor Benson & Co.* (5). Selborne, L. C. said: "You must look at the actual circumstances of the case in order to see whether the

(1) (1867) 4 H. and C. 149; L. R. 1 Exch. 117; L. R. 2 Exch. 135; 143 R. R. 534.

(2) (1848) 11 Q. B. 713; 75 R. R. 607.

(3) (1850) 11 Arkansas 475; 52 Am. Dec. 282.

(4) (1874) L. R. 9 C. P. 208.

(5) (1884) 9 App. Cas. 434 (438, 443).

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one party to the contract is relieved from its future performance by the conduct of the other ; you must examine what that conduct is, so as to see whether it amounts to a renunciation to an absolute refusal to perform the contract, such as would amount to a rescission, if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part." In the same case, Lord Blackburn added : "Where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, 'if you go on and perform your side of the contract, I will not perform mine,' that in effect amounts to saying 'I will not perform the contract.'" To the same effect is the observation of Lord Collins in *General Bill Posting Co. v. Atkinson* (1) "the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." As renunciation is thus based on an absolute abandonment of the contract, it follows, as Bowen, L. J. said in *Boston Deep Sea Fishing Co. v. Ansell* (2), that a rescission of the contract implies that you relegate the parties to the original position they were in before the contract was made ; that cannot be where half the contract has been performed. It is also well settled that the Court insists upon clear and precise evidence of a mutual intention to determine and abandon the contract : *Robinson v. Page* (3) ; *Buckhouse v. Crosby* (4). Sugden, L. C. said in *Carolan v. Brabazon* (5) : "The Court requires as clear evidence of the waiver as of the existence of the contract itself ; and will not act upon less." To the same effect is his observation in *Moore v. Crofton* (6) ; Smith, M. R., in *Clifford v. Kelly* (7) and in *Cartan v. Bury* (8) quotes with approval the statement of Lord St. Leonards in his celebrated works on Vendors and Purchasers (1862) Ch. 4, Sec. 9, para. 3, page 168 : "An abandonment of the *whole* agreement, *clearly* made out, (for the Court will look at the evidence with great jealousy), is a good defence in equity" : *Brophy v. Connolly* (9) ; *Chambers v. Betty* (10) ; *Homan v. Skelton* (11) ; *Chubb v. Fuller* (12) ; *Lloyd v. Collett* (13) ; *Reynolds v. Nelson* (14) ; *Garrett*

(1) (1909) App. Cas. 118 (122).

(2) (1888) 39 Ch. D. 339 (365).

(3) (1826) 3 Russell 114 ; 7 R. R. 26.

(4) (1737) 2 Eq. Cases. Abr. 32.

(5) (1846) 3 J. & L. 200 (209) ; 9 Ir. Eq. Rep. 224.

(6) (1846) 3 J. & L. 438 (445) ; 7 Ir. Eq. Rep. 344.

(7) (1858) 7 Ir. Ch. Rep. 333.

(8) (1860) 10 Ir. Ch. Rep. 387 (400).

(9) (1857) 7 Ir. Ch. Rep. 173.

(10) (1815) Beatty 488.

(11) (1860) 11 Ir. Ch. Rep. 75 (97).

(12) (1858) 4 Ir. N. S. 153.

(13) (1793) 4 PRYNN C. C. 469.

(14) (1821) 6 Madd. 8 ; 22 R. R. 225.

v. Besborough (1) ; *Cubitt v. Blake* (2) ; *Earl of Rosse v. Sterling* (3). Now let us examine the relative situation of the parties in the light of these principles. The applications by the plaintiff for return of his money do not state explicitly that he wished to rescind the contract. His conduct, indeed, was inconsistent with any such possible implication ; he did not offer to quit possession of the land on receipt of the money. In fact, if he rescinded the contract and gave up the land, he would be entitled not only to a return of his money, but also to compensation assessed under the Land Acquisition Act. The Chairman, when he recorded the order for return of the money, no doubt, noted that if the plaintiff took back the money, he might find himself estopped in his attempt to enforce the contract—not, indeed, the earlier contract, but the later agreement—which formed the basis of the unexecuted draft conveyance ; in any event, his remarks show that he, at any rate, thought that there was a subsisting contract between Ramkumar Saha and the District Board. But whatever the result might have been, if the plaintiff had actually received back his money, the incontestable fact remains, that the amount has not yet been paid to him. The order of the Chairman was never communicated to him ; the money has never been tendered, much less actually paid, to him. The District Board have never sought to obtain possession of the land from him, as they would unquestionably be entitled to do on a rescission of the contract. The plain truth is that whatever may have been recorded on paper, both parties have conducted themselves as if there had been no rescission ; they have not been relegated to the original position they occupied before the contract was made. Their conduct has been inconsistent with the theory of rescission, and when, for the first time, more than a year after the order for refund had been recorded by the Chairman, the District Board attempted to sell the land as if they were emancipated from continued liability under the contract, the plaintiff forthwith protested and relied upon the contract ; and there is no room for doubt that whatever might have been said, nothing had been done, up to that stage, on either side, on the hypothesis that the contract had been abandoned. The demand of a return of the deposit is not by itself conclusive evidence of an intention to abandon the contract ; but, where, as in *Whalen v. Stuart* (4), such demand is accompanied by other conduct consistent only with an intention to rescind, the vendee who

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(1) (1839) 2 Dr. & Wal. 441 ; 2 Ir. Eq. Rep. 180.

(2) (1854) 19 Beav. 454 ; 105 R. R. 209. (3) (1816) 4 Dow. 442.

(4) (1909) 194 N. Y. 495 ; 87 N. E. 819.

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has so acted cannot later seek specific performance, for, as has been said, a non-existent contract cannot be specifically enforced. We hold accordingly that the conduct of the parties does not show that the contract was rescinded, and it has not been urged that, apart from this, the conduct of the plaintiff has been such that though it does not amount to rescission, it still disentitles him from insistence on specific performance, as was held in *Price v. Assheton* (1) and *Price v. Dyer* (2). The conclusion follows that, at the date of the institution of this suit, there was a valid contract specifically enforceable by the plaintiff against the District Board.

No question of limitation obviously arises under article 113 of the schedule to the Indian Limitation Act, as the plaintiff had notice, for the first time, on the 22nd February, 1909, that the performance was refused, and the suit was instituted within three years from that date.

The question next arises, whether the plaintiff is entitled to the assistance of the Court in any other manner. The District Judge has made in his favour a conditional decree for recovery of Rs. 992-11-1 from the District Board. In the view we take of the right of the plaintiff to enforce specific performance of the contract of the 6th September, 1898, it is plain that this decree must be modified. The plaintiff is not entitled to a return of the sum of Rs. 25 paid on the 6th September, 1898, but he is entitled to a return of the sum of Rs. 957-11-1 paid on the 4th December, 1900, when he accepted the second offer. The second agreement, as we have already seen, is not enforceable and never superseded the original contract. Consequently, the District Board is not entitled to retain the money paid by the plaintiff thereunder. It cannot be disputed that where a Corporation receives money or property under an agreement, which turns out to be *ultra vires* or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation: *Rankin v. Emigh* (3). This is good sense and based on sound principle. The relief is granted, not upon the illegal contract, nor according to its terms, but on an implied contract of the Corporation to return, or failing to do that, to make compensation for property or money which it has no right to retain; to maintain such an action is not to affirm but to disaffirm the ille-

(1) (1834) 1 Y. & C. Exch. 82; 41 R. R. 222.

(2) (1810) 17 Ves. 356; 11 R. R. 102.

(3) (1910) 218 U. S. 27.

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gal contract : *Central Transport Co. v. Pullman Palace Car Co.* (1). As Baggallay, L. J. said in *Chapleo v. Brunswick Building Society*, (2), if the Company has received the benefit of the payment, if, for instance, that amount has found its way, to the credit of its banking account, the plaintiffs might have been enabled to establish a claim against the Company to the extent of the benefit derived by it from the transaction : *Lawford v. Billericay Rural Council* (3) ; *Douglass v. Rhyl Urban District Council* (4). In the case before us, the plaintiff is clearly entitled to a return of Rs. 957-11-1 together with interest thereon from the date of deposit to the date of realisation.

One other question requires consideration, namely, whether the plaintiff is entitled to relief against the District Board by way of cross-objection to the decree, in an appeal preferred by the other defendants. It need not be disputed that, as an ordinary rule, a respondent in an appeal is not entitled to urge cross-objections except as against the appellant : *Bishnu Churn v. Jogendra Nath* (5) ; *Shabiuddin v. Deomoorat* (6) ; *Kallu v. Manni* (7) ; *Jadunandan v. Koer Kallyan* (8) ; *Nursey v. Harrison* (9) ; *Abdul Ghani v. Mahammad* (10). But Rule 22 (3) of Order 41 of the Code of 1908 has materially altered the pre-existing law by substitution of the words "party who may be affected by such objection" for the word "appellant" contained in section 561 (3) of the Code of 1882. It may further be observed that Rule 33 of Order 41 has conferred wide discretionary powers on the Court of appeal to alter the decree of the Court below as the case may require. In the case before us, the Shaha defendants, who are appellants in this Court, have attacked even the conditional decree made by the District Judge in favour of the plaintiff ; the appeal, in fact, re-opens the whole matter in controversy and calls upon the Court to re-examine the questions in dispute from all possible points of view. That appeal has been supported by the District Board respondent. The plaintiff respondent has been constrained, with a view to ensure his safety, to take cross-objections, which, if successful, would make his title unassailable. These cross-objections, no doubt, primarily touch the co-respondent, but that co-respondent has

(1) (1890) 139 U. S. 24.

(2) (1881) 6 Q. B. D. 696 (711).

(3) (1903) 1. K. B. 772 (780, 786).

(4) (1913) 2 Ch. 407.

(5) (1898) 1. L. R. 26 Calc. 114.

(6) (1903) 1. L. R. 30 Calc. 655.

(7) (1900) 1. L. R. 23 All. 93.

(8) (1911) 15 C. L. J. 61 ; 16 C. W. N. 612.

(9) (1913) 1. L. R. 37 Bom. 511 ; 15 Bom. L. R. 781.

(10) (1906) 1. L. R. 28 All. 95.

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throughout supported the defendants appellants against the plaintiff respondent. No question of surprise arises, as every party has been given full notice and opportunity to place his own case before the Court in its true bearing. The circumstances are thus obviously of a very special character; the District Board has decided to part with the land acquired for a purpose which has fallen through. The substantial question is whether relief should be granted in respect of that land to the original owner or to the subsequent purchaser. If we allow the cross-appeal, though relief is granted in form against the District Board, the ultimate result is that the title of the original owner is secured as against the subsequent purchaser. In these peculiar circumstances, it is in no sense unjust that effect should be given to the cross-objections. There is no answer to the cross-objections on the merits, while the appeal itself is, as we have seen, groundless. The cross-objections must, consequently, succeed, while the appeal cannot be sustained.

We may add that even if we had declined to entertain the cross-objections, and had merely dismissed the appeal, the practical result would have been identical with what will be the consequence of our decree. The plaintiff Ramkumar Saha has been in undisturbed possession of the land all along, notwithstanding the acquisition. His possession became adverse to the Board on the 21st February, 1898; consequently, he acquired an indefeasible title on the 21st February 1910. If the conditional decree made by the District Judge be maintained, the plaintiff need never take back the deposit; but he will be entitled to receive from the Collector the compensation awarded under the Land Acquisition Act. The plaintiff thus achieves the end he has in view, namely, retention of possession of the land; that possession can no longer be disturbed by the District Board. The counsel for the District Board fully appreciated the difficulties of the situation; he complained that the decree of the District Judge is ineffectual for his purposes, as it does not entitle the District Board to recover possession of the land by execution and on payment of the decretal amount to the plaintiff. The obvious answer is that the decree cannot be modified, in the way suggested, in favour of the District Board; the Board are not the plaintiffs in the suit, and, have never chosen to appeal against the decree made by either Court.

We have finally to consider the question of costs. In the three appeals, in which the decree of the District Judge is affirmed, the appellants will pay the costs of the respondents in this Court. In the other appeal, in which the appeal is dismissed and the cross-ob-

jections allowed, the appellants will also pay the costs of the plaintiff respondent. But the costs of the plaintiff, both in the primary Court and in the Court of the District Judge, should, in our opinion, be paid by the District Board: *Thornhill v. Weeks* (1). The history of this protracted litigation proves conclusively that the whole difficulty has been created by the utterly unbusinesslike manner in which the transaction reviewed by us have been carried on ever since 1898 by the District Board of Chittagong. There is no exaggeration whatever in the quaint observation, embodied in one of the office notes in the record, that this matter "remained to be decided from a long time owing to different opinions of different officers." One can only hope that the long delay and uncertainty, which have characterised the proceedings of the Board in this particular matter, furnish but a solitary instance of the way in which business is transacted by a corporation created for purposes of public utility. The net result to the plaintiff has been that though his land was acquired under very doubtful circumstances in 1898, he has had to wait for more than 18 years to get back his property, notwithstanding that he has, in the interval, responded promptly to every demand of the District Board.

The result of our decision may now be summarised. Appeals Nos. 1979, 1980 & 1981 of 1912 are dismissed with costs. Appeal No. 1243 is dismissed, but the cross-objections therein are allowed and the decree of the District Judge discharged. In lieu thereof, we direct that the suit (435 of 1909), out of which that appeal arises, do stand decreed in the manner following. The plaintiff Ramkumar Saha is awarded a decree for specific performance of the contract of sale of the land mentioned in the schedule to the plaint, as against the District Board of Chittagong; the Board is directed to execute a conveyance in his favour in accordance with law. On failure of the Board to execute the conveyance, the plaintiff will be at liberty to proceed in accordance with Order 21, Rules 32 and 34 of the Code. The possession of the plaintiff will be confirmed, and should it transpire that he has been dispossessed, he will be restored to possession in execution of the decree of this Court, as explained in *Madan Mohan v. Gaja Prasad* (2); *Fateh Chand v. Narsing Das* (3); The plaintiff will, in addition, have a decree, against the District Board, for Rs. 957-11-1 together with interest thereon at 6 per cent. per annum from 4th December, 1900 to the date of realisation. The plaintiff will have his costs in the Courts of the Subordinate

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(1) (1915) 1 Ch. 106.

(2) (1911) 14 C. L. J. 159.

(3) (1912) 22 C. L. J. 383.

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Judge and the District Judge, from the District Board, and his costs in this Court, from the other defendants. A self-contained decree, which will set out the various sums in detail, will be drawn up in this Court.

It has been brought to our notice that the District Board have not been correctly described in these proceedings in accordance with section 20 of Act III of 1885 B. C. The cause title of the plaint will accordingly be amended and the expression "District Board of Chittagong" will be substituted for "The Chairman of the District Board, Chittagong."

A. T. M.

*Appeals Nos. 1979 to 1981 dismissed :**Appeal No. 1243 dismissed : Cross-objection allowed.*

PRIVY COUNCIL.

—: 0 :—

PRESENT: *Lord Shaw, Sir George Farwell, Sir John Edge and
Mr. Ameer Ali.*

RAJWANT PRASAD PANDE AND OTHERS

v.

MAHANT RAM RATAN GIR AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE
NORTH-WESTERN PROVINCES, ALLAHABAD.]

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June, 8.

Res judicata—Suit for rescission of a decree—Effect of order in execution proceedings—Fraud.

Where the plaintiffs sued for a declaration that they were no party to a mortgage decree which was passed *ex facie* against them, and it appeared that on the application of the decree-holder to make the decree absolute the plaintiffs preferred objections thereto which were disallowed:

Held, that the plaintiffs raised or ought to have raised all the points now raised in the execution proceedings, and their suit was *res judicata*.

Malkarjun Bin Shidramappa Pasare v. Narhari Bin Shivappa (1) referred to.

Held, also, that the plaintiffs' suit was a suit for the rescission and destruction of a former decree of a competent Court and such rescission and destruction could be obtained on the ground of fraud practised on the Court, but there being no fraud the suit must be dismissed.

Appeal from a decree of the High Court at Allahabad (February 23, 1911) reversing a decree of the Court of the Additional Subordinate Judge of Gorakhpur (August 17, 1909).

The first respondent obtained on the 30th April 1897 a mortgage decree against one Prag Dat Pande, and the appellants and the other respondents (Bhagwant Prasad and his sons) in this appeal, who were all members of a joint Hindu family. On the 22nd September 1900 the mortgage decree was made absolute. Subsequently the decree of 30th April 1897 was set aside as against Bhagwant and his sons on the ground that they had not been properly served, and the suit was tried against them. In this trial Prag Dat and the appellants were not permitted to take any part. On the 22nd September 1902 the Subordinate Judge passed a mortgage decree which was affirmed by the High Court, against Prag Dat, the appellants and Bhagwant and his sons. In 1906, the mortgagee applied to have the decree of the 22nd September 1902 made absolute. Prag Dat and the appellants objected on the grounds that an order absolute had already been made against

(1) (1900) L. R. 27 I. A. 216; I. L. R. 25 Bom. 337.

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them, on the 22nd September 1900, and that a second decree absolute could not be made against them as they were no parties to the case when it was re-opened and the decree of September 22, 1902 was made. The Subordinate Judge overruled the objections and made an order absolute on the 3rd November 1906. The objectors appealed to the High Court but their appeal was dismissed on the 26th February 1908. Thereupon they instituted the present suit praying for a declaration that the inclusion of their names in the decree of the 22nd September 1902 was not binding on them, or, alternatively, that they were not parties to that decree or to any of the proceedings consequent thereon. The Subordinate Judge decreed the suit holding that the decree of the 22nd September, 1902, was made against the plaintiffs without any jurisdiction. But on appeal by the mortgagee the High Court dismissed the suit for the following reasons:—

“The only other basis of the plaintiffs’ claim, therefore, is that the Court had no jurisdiction to pass the decree. It has been repeatedly held and it is not denied by the learned vakil for the respondents that in a suit for sale upon a mortgage there can be but one decree for sale. The latest case in which this view was held is that of *Gauri Sahai v. Ashfaq Husain* (1). Therefore the decree which the Court finally passed in the cause, namely, the decree of the 22nd September, 1902, was a proper decree for sale upon the mortgage of the 10th of June, 1884. It is contended on behalf of the plaintiffs that as the earlier decree of the 30th of April, 1897, was not set aside on the application made by Prag Dat under section 108 of the Code of Civil Procedure, 1882, that decree must be held to have become final and must be deemed to be a subsisting decree, and the result therefore is that there are two decrees in the suit. We do not agree with this contention.

As we have stated above in a suit for sale upon a mortgage, as also in a suit for foreclosure of a mortgage, there can be but one decree, and that is the decree which was finally passed on the 22nd of September, 1902. The Court had full jurisdiction to pass that decree, and the effect of it was that the earlier decree of the 30th April, 1897, was merged in it. Mr. Abdul Majid, the learned council for the appellant, concedes that his client does not profess to hold two decrees against the respondents, but only one decree, namely, the final decree of the 22nd of September, 1902. This decree as we have already said, was made absolute as against the plaintiffs, and the order making it absolute was affirmed by this

(1) (1907) I. L. R. 2 All. 623.

Court on the appeal of the plaintiffs. We are therefore unable to hold that it is now open to the plaintiffs to bring this suit to have the decree of the 22nd September, 1902, set aside, which is in substance the object of the present suit. The learned vakil for the appellant has referred us to the ruling of the Calcutta High Court, *Jogeswar Atha v. Ganga Bishnu Ghattack* (1). In that case it was held that a suit could be brought to rectify a mistake in a decree. That is not the case here. This is not a suit to rectify a decree but to have it declared that the decree is not binding on the plaintiffs. In our opinion the suit is not maintainable, and the decree which was made on the 22nd of September, 1902, and was subsequently made absolute on the 3rd of November, 1906, is a decree properly made by a Court having jurisdiction to make it and is binding on the plaintiffs."

Prag Dat died after the decree of the High Court, and the plaintiffs appealed against it to His Majesty in Council.

Lowndes, for the Appellants: The decree of the 22nd September, 1902, was passed without hearing the appellants, who are not therefore bound by it. The Court had no jurisdiction to make that decree against the appellants. There was already a binding decree on them and an order absolute for sale of the mortgaged property having been made against them on the 22nd September, 1900, it was not competent to the Court to pass a second decree against them in respect of the same subject matter. The decree of the 22nd September, 1902, is for a larger amount which includes interest allowed at the mortgage rate up to realisation. The Court was wrong in allowing such a rate of interest: *Sundar Koer v. Sham Krishen* (2). A suit to rectify a decree is maintainable: *Jogeswar Atha v. Ganga Bishnu Ghattack* (1). Reference was also made to *Maharajah of Bhuratpur v. Ram Kanno Dei* (3), and the Code of Civil Procedure, 1882, sections 82 and 244.

De Gruyther K. C., and *Dube*, for the first Respondent: The effect of the order in 1901, made under S. 108 of the Code of Civil Procedure, 1882, against Bhagwant and his sons, was to restore the suit to the file to enable them to put forward their defence, and as the appellants had already been heard, they were not allowed to defend the suit again. The Court came to the conclusion, whether rightly or wrongly, that the decree of the 22nd September

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(1) (1904) 8. C. W. N. 473.

(2) (1906) L. R. 34 I. A. 9; I. L. R. 34 Calc. 150; 5 C. L. J. 106.

(3) (1900) L. R. 28 I. A. 35; I. L. R. 23 All. 181.

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1900, having been set aside there should be a fresh decree under Sec. 88 of the Transfer of Property Act, against all the defendants. If the decree of the 22nd September, 1902, had been against Bhagwant and his sons alone, it could not have been executed against the joint family property, and the decree of the 22nd September, 1900, being against Prag Dat and the appellants could not equally have been executed against that property. For this reason the decree of the 22nd September, 1902, was made against all the defendants to the suit. If the appellants were aggrieved thereby, they had a right to appeal which they ought to have exercised. They chose not to exercise that right, and are not entitled to bring a separate suit for putting that decree aside. The Court treated the decree of 1900, as a mere step towards granting relief, and the decree of 1902, which completed it, gave for the first time the respondent decree-holder a joint decree which he was entitled to and is binding on the appellants : *Haji Ashfaq Husain v. Lala Gouri Sahai* (1). The points now raised had been or ought to have been raised by the appellants in the execution proceedings by way of objections, which were decided against them, and consequently this suit is *res judicata* : *Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry* (2); *Ram Kirpal Shukul v. Mussumat Rup Kuari* (3); and *Malkarjun Bin Shidramappa v. Narhari Bin Shivappa* (4). Reference was also made to *Prosunno Coomar Sanyal v. Kalidas Sanyal* (5).

Lowndes, in reply : The decree of 1900 is binding on the appellants and has not merged in the decree of 1902 as is seen from the fact that the respondent decree-holder applied for its execution in 1903. The suit is not *res judicata*, but is maintainable : *Pran Nath Roy v. Mohesh Chandra Moitra* (6).

The judgment of their Lordships was delivered by

Junt, S.

Lord Shaw :—This is an appeal from a decree of the 23rd February 1911, of the High Court of Judicature for the North-Western Provinces (Allahabad), which reversed a decree dated the 17th August 1909 of the Court of the Additional Subordinate Judge of Gorakhpur. The Court of first instance allowed the plaintiffs' claim. On appeal the claim was dismissed.

(1) (1910) L. R. 38 I. A. 37; I. L. R. 33 All. 264; 13 C. L. J. 351.

(2) (1881) L. R. 8 I. A. 123; I. L. R. 8. Calc. 51.

(3) (1883) L. R. 11 I. A. 37; I. L. R. 6 All. 263.

(4) (1900) L. R. 27 I. A. 216 (225); I. L. R. 25 Bom. 337.

(5) (1892) L. R. 19 I. A. 166; I. L. R. 19 Calc. 683.

(6) (1897) I. L. R. 24 Calc. 546.

The object of the present suit is, by its terms, declared to be three-fold. But upon examination the substantial and only object is for a declaration in favour of the plaintiffs against the defendants to the effect that the plaintiffs are no party to a certain order which was passed *ex facie* against them on the 22nd September 1902. Further declarations are asked that the decree is ineffectual, and null and void against them, and so forth. In substance, as has been said, the object of the present suit is for a declaration that a decree pronounced by a Court of competent jurisdiction on the 22nd September 1902, and bearing to apply to the present appellants, does not in fact apply to them.

The circumstances of the case are these. In 1884 Prag Dat Pande executed a mortgage over certain family property, of which he was himself manager, in favour of the predecessor in title of the respondents. He had two sons, Rajw nt Prasad and Bhagwant Prasad. In 1897 a suit for sale under the mortgage, and directed against, *inter alia*, these three persons, was instituted. It was heard *ex parte*, and on 30th April 1897 a decree was made allowing the plaintiffs' claim. An order absolute was made on the 22nd September 1900.

In 1901, however (to put aside altogether the proceedings at the instance of Prag Dat, and to keep to the actual relevant challenges made in the course of these litigations), Bhagwant and his two sons obtained an order under section 103 of the Code of Civil Procedure, 1882, to have the decree of the 30th April 1897 set aside, on the ground that there had been insufficient service upon them. It was found that the objection taken on the point of service was sound. The Court in India was accordingly confronted with this situation, that in regard to a mortgage over a joint property a suit had been instituted and decree had been taken against all of the joint family, but that one member thereof had been properly served with the suit and another had not. A certain embarrassment arose in consequence, and these proceedings, so protracted, ensued.

So far as Rajwant, the present appellant, was concerned, the original suit was found to have been properly initiated, and the summons properly served. The Courts below adopted the view that the decree obtained in those circumstances was a decree practically final as regards Rajwant, and that with regard to the subsequent stages therein occasioned by Bhagwant's application, Rajwant had no right of appearing. Their Lordships are of opinion, however, that such questions, confusing as they appear, have no relation whatsoever to the point which is to be considered in this appeal.

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On the 22nd September 1902 the Subordinate Judge delivered judgment, and he made another decree. Notwithstanding the decree which had already, as has been stated, been pronounced in April 1897, he granted a complete decree to the respondents in this appeal, against all the members of the joint family. The situation that thus arose was that in September 1902 a decree was comprehensively directed against all the joint family of which Rajwant, the appellant, was one member, Rajwant, however, being already bound by the decree which was passed in April 1897.

It would have been clear to the Board that there must have been, and could have been, no intention upon the part of the plaintiffs to put in operation the earlier decree of 1897; but the Board is surprised to observe that on the 23rd June 1903, namely, after the second and comprehensive decree had been obtained, an application was actually made for execution of the decree—not the second and comprehensive one of 1902—but the original decree of 1897. Their Lordships think it right to record that in that application this statement was made:—

“In the beginning the name of Bhagwant Parshad also is entered as a defendant, but on his application this decree was set aside against him, and consequently his name was not entered in the column of judgment-debtors. Another decree has been passed as against him. It will be executed separately.”

Under those circumstances their Lordships are not surprised to find that in the year 1906, when an order was asked to make the decree of September 1902 absolute as against all the members of the joint family, the appellants took steps to have the situation cleared up. Accordingly, on the 7th July 1906, that application having been made, Rajwant preferred objections to it. Those objections, however, were disallowed, and the decree was made absolute by the Subordinate Judge on the 3rd November 1906. Their Lordships are clearly of opinion that in that suit each and all of the points stated upon this appeal were, or ought to have been, brought before the Court below. But if any doubt existed in their Lordships' minds on that topic it would be removed by a perusal of the terms of the judgments of the Subordinate Judge and of the High Court; because after the Subordinate Judge had made his order on the 3rd November 1906 the objectors, the present appellants, appealed to the High Court, and did so upon the same arguments as they now propound in support of the present appeal to this Board. The grounds of judgment of the High Court make it clear beyond

all question that the very points which are now urged were points then taken. The objections were disallowed.

It is contended before their Lordships, however, that this matter cannot be dealt with as *res judicata*; that it is open to suitors in India, who have exhausted the remedies competent to them, and after final decree has been obtained against them, to institute a fresh suit, or series of suits, the object of which is to declare that a decree, competently and with adequate jurisdiction obtained therein, is not applicable to them, although they are named in that decree. Their Lordships have no sympathy with this procedure. It is radically incompetent.

The objections can be stated *seriatim*. The objections that are now taken are, first, that the decree of 1897 has never been set aside, and that, accordingly, the later decree of 1902 cannot stand. The answer made is that the former has been impliedly set aside by the latter. The second objection is practically to the same effect. The matter of the second decree was *res judicata*, and, therefore, they are two decrees against the same Indian subject. The answer made to that, in the view of the High Court, is that there is a merger by the second decree of the first. The third objection is that the latter decree is for a definite sum of money, larger than the sum of money contained in the former. The answer is that the interest accounts for the difference, and, secondly, that the doctrine of merger also applies.

Their Lordships are of opinion that upon none of those points ought they to make a pronouncement in this case. The judgment of the Court below has been particularly canvassed on the doctrine of merger, as there treated. Their Lordships desire to make it clear that in the judgment now given no affirmance is given of the doctrine or application in the High Court of merger, either in a general sense or in the sense of a *vox signata*. The decree of the 26th February, 1908, sufficiently covers each and all of the points which have just been enumerated. The case under which these objections were brought forward was competently before the Court; it had jurisdiction to entertain them.

It is said that the Court below decided the objections wrongly, and that the decree was erroneous. Their Lordships think it is very trite and very familiar that a challenge of the method of the exercise of the jurisdiction of a Court can never in law justify a denial of the existence of such jurisdiction. The former has reference to the merits of the case, and the merits of this case have been in all points directly and substantially determined between the same parties

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as are now in contention at their Lordships' Bar. The familiar principle is laid down in a series of cases, of which the judgment of Lord Hobhouse in *Malkarjun Bin Shidramappa v. Narhari Bin Shivappa and another* (1) is not a very remote example. Their Lordships cannot countenance the laying aside of all that has happened in previous litigations, the allowing of a process to become final, and the institution of a fresh suit, the object of which is to declare that, although in terms it was applicable to a particular subject of the King who was a party to the proceedings, still, upon a new application to Courts of justice, a different result should be reached, and it should be decided that the proceedings and decree did not apply to him.

This suit, in their Lordships' judgment, is equivalent to a suit for the rescission and destruction of a former decree of a competent Court. That rescission and destruction could be obtained on the ground of fraud "practised on the Courts below"; but fraud has been eliminated from this case. And accordingly these proceedings are, in their Lordships' judgment, a mere colour for a fresh suit on matters already competently settled by law.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Douglas Grant: Attorney for the Appellants.

Barrow, Rogers & Nevill: Solicitors for the Respondent.

J. M. P.

Appeal dismissed.

(1) (1900) L. R. 27 I. A. 216.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, K. C., Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.

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November, 26, 29.

BILASIRAM THAKURSIDDAS

v.

EZEKIEL ABRAHAM GUBBAY*

Contract, breach of—Contract for sale and delivery of goods in instalments—Construction of—Damages, measure of—Last period not elapsed when the action brought or cause tried.

* Appeal from Original Civil Decree No. 23 of 1915 against the decision of Mr. Justice Chaudhuri, dated the 19th March, 1915.

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A contract provided that the shipment would be made by steamers during July to December, 1914, and that any shipment might be made within 7 days after the expiry of the particular months. After this contract had been made, war was declared on the 4th August, 1914; 6 days later, the seller wrote to the buyer and asked him to bear the extra war insurance. The purchaser replied that he was bound by the contract and was prepared to carry out all and only such objections as were included in its terms: The result of further correspondence was that on the 18th August, 1914, the seller intimated to the purchaser that he had definitely cancelled the contract:

Held, that, on the construction of the contract and from the circumstances of the case, the buyer had the right to demand delivery of the goods during the months from July to December.

When the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for non-delivery. The measure of damages is the estimated loss directly resulting from the seller's breach of contract. Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they should have been delivered, notwithstanding that the last period had not elapsed when the action was brought or when the cause was tried.

Per Mookerjee, J.—An agreement to accept delivery by instalments, may, in the absence of an express agreement, be inferred from the conduct of the parties and circumstances of the case.

Thorton v. Simpson (1); *Tarling v. O'Riordan* (2); and *The Colonial Insurance Co. of New Zealand, v. The Adelaide Marine Insurance Co.* (3) referred to.

In the absence of any indication to the contrary, the instalments must be deemed to have been intended to be distributed rateably over the period appointed for the delivery of the whole quantity of goods.

Caddington v. Paleologo (4) referred to.

If the damages have been assessed on erroneous principle by the lower Court, the judgment cannot stand; but it does not follow that the appellant is entitled to a reduction of the amount specified in the decree; he must satisfy the Court that on the correct principle he is not liable for the amount decreed against him.

Appeal by the Defendant.

Suit for² damages for breach of contract.

The contract, so far as is material, was in these terms:

"Shipments to be made by steamers during July—December 1914. Shipment in any month may be by one or more steamers. Provided always that early shipment or late shipment (if not late by more than 7 days) or delay in arrival, caused otherwise than by shipment late by more than 7 days will not entitle buyers to cancel this contract or to refuse to take delivery of any goods shipped in pursuance of this contract or intended by sellers for the
(1) (1816) 6 Taunton 556; 2 March. 267. (2) (1878) 2 L. R. Ir. 82 (86, 89).
(3) (1886) 12 App. Cas. 128 (138). (4) (1867) L. R. 2 Exch. 193 (197).

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fulfilment thereof or available for such fulfilment, and that in no event will buyers have any claim upon sellers for any loss or damage suffered by reason of early or late shipment (whether late by 7 days or more) or of delay in shipment or arrival. The date of bills of lading in respect of goods shipped or intended as aforesaid or available for the fulfilment thereof will be conclusive evidence against buyers of date of shipment. Provided also that if shipment within the time allowed for shipment as aforesaid of any goods bought, procured or available for shipment in pursuance hereof be prevented by strikes, lockouts of operatives, dock labourers, carriers or seamen accidents at works, upon railways, docks, wharfs, jetties or in port of shipment, bankruptcy or failure of Manufacturers or Suppliers, quarantine or other regulations, or by any act of God or force *majeure*, including all causes or occurrences beyond control of sellers, sellers alone will have the option of cancelling this contract in respect of the quantity of goods the said shipment of which shall have been so prevented. In the case of shipments from an European port sellers will be at liberty, in the event of closure or blockage of the Suez Canal, to ship by, or (in the event of such closure or blockage occurring after shipment) to transhipment to, steamer *via* the Cape."

"This agreement to be deemed to be and to be construed as a separate contract in respect of each shipment of goods shipped in pursuance thereof or intended by sellers for, or available for the fulfilment of this contract and the rights and liabilities of sellers and buyers respectively to be the same as they would have been had a separate contract been signed in respect of each such shipment."

"Buyers are not at liberty to assign this contract or any right, benefit or obligation of buyers thereunder save in accordance with the consent of sellers to be previously obtained and endorsed upon the bought note by sellers. Unless so expressly stated, such consent of sellers will not release buyers from any liability or obligation hereunder."

The other material facts are stated in the judgment.

Chaudhuri, J :—The plaintiff purchased 300 tons of Brown Java Sugar from the defendant firm shipments July to December, 50 tons each month. The contract provided an extra seven days for each month's shipment, that is to say, the July shipment could have been made in the first week of August and so on ; there is evidence that the voyage from Java to Calcutta direct takes 11 days therefore the first shipment was due to arrive about the 17th or 18th of August 1914. In the meantime war had been declared

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and the defendant firm wrote to the plaintiff asking him if he was prepared to pay extra war insurance rate and in the event of his not agreeing whether he would cancel the contract. The plaintiff replied that he would abide by the terms of his contract. Then on the 18th August came a letter from the defendant saying that he had already cancelled the contract, although there had been no previous cancellation by him. It is quite clear that the defendant's letter of the 18th must be taken as his repudiation. This letter was received by Gubbay the plaintiff on the 18th August between 6 and 7 p.m. when it was too late for him to take any steps that day. The next day he went to the market and tried to purchase ready goods at spot price. The rate for the same quality was Rs. 7-6-6 rising to Rs. 7-8. He tried that day and the next to buy forward shipments August to December, and manage to get one lot of 50 tons at Rs. 8/- for the August shipment. The evidence is quite clear that at that time there were a large number of buyers and very few sellers. I accept the evidence which has been given by the plaintiff with regard to what he did and the rates he was offered. It is supported by the evidence of Mr. Manessah who is in the Sugar Department of a very large firm in Calcutta. He has produced his books, and his evidence entirely supports the claim made by the plaintiff. There was another witness of the name of Chiman Ram on behalf of the plaintiff. He was examined and partially cross-examined. He was asked to produce certain Books and his examination stood over in consequence. As he failed to appear by the time the rest of the evidence was finished, the plaintiff's counsel asked that his evidence should be rejected altogether. The defendant also did not desire that the case should stand over for further cross-examination. So I am treating that evidence as not given. The defence has been three-fold. (1) The contract was of a wagering nature. That defence was abandoned. (2) That under the terms of the contract the defendant was entitled to claim extra war insurance from the plaintiff, and he not having agreed to pay it, the defendant was entitled to cancel the contract. There is no support for this from the contract. I do not think the plaintiff could have been justly called upon the extra rate. (3) That having regard to the state of the market, it was the duty of the plaintiff to try and minimise the loss as much as possible. I do not think the plaintiff could have done more than what he did. The market had gone up. Sellers were anxious to settle, and a large number of settlement contracts were entered into in the market. There were very few forward

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sellers, but there was a large number of buyers. I think the plaintiff is entitled to damages on the basis claimed in the plaint, namely for the July shipment the "spot price" for ready goods for the August shipment at Rs. 8 and also for September to December at the same rate.

With regard to the evidence on behalf of the defendant most of the contracts were settlement contracts. Messrs. Ralli Brothers' Banian who was examined said that the Ralli Brothers were not sellers at the rate mentioned by him. He could not say whether they were sellers at Rs. 8 or not. He said he did not know. This I find difficult to accept. There was another witness named Manna Lal who purported to give evidence of an actual sale. It is difficult to say from his evidence as to what the nature of that transaction was. It seems to me to have been in the nature of a settlement, in which the defendant was concerned. The plaintiff had not sufficient opportunity to investigate the particulars of that transaction. I do not think the rates for settlement contracts in the then condition of the market can be treated as the bazar rate. People settled on the best terms they could. The rate for actual sales ought to be accepted. There is no dispute practically about the ready rate. The plaintiff tried to purchase against the other shipments from different sellers all well known in the Calcutta market and failed to get more favourable rates. I prefer the evidence given on his behalf and decree the suit with costs on Scale No. II including reserved costs.

Against this judgment, the defendant appealed.

Sir S. P. Sinha, Messrs. B. C. Mitter and N. N. Gupta for the Appellant.

Messrs. Zorab and Hyam for the Respondent.

November, 29.

Sanderson C. J.—In this case the plaintiff brought his action against the defendants claiming damages for breach of contract. The contract was in respect of 300 tons of Brown Java Sugar, which was to be delivered in Calcutta, and the contract price was Rupees six and pies six per Bazar maund; the goods were to be delivered Ex. Kidderpore Docks Jetty or ghat, and the shipments were to be made by steamers during July to December 1914. The date of the contract was the 4th of June 1914, and the first shipment would have to be made in July: But in the contract there was a clause giving the shipper seven days margin, so that if he shipped the July shipment by the 7th of August, it would be in accordance with the terms of the contract: It was given in evidence in the course of the case that the length of the voyage would be eleven

days but it was said on behalf of the plaintiff that it would be thirteen days, and for the sake of this case we may take it from eleven to thirteen days, so that the first shipment under this contract, namely, the July shipment, if the shipper took the whole margin which was allowed to him, that is, the first seven days of August, would be due to be delivered in Calcutta about the 18th or 19th of August.

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Now, on the 4th of August, as every body knows war was declared, and, a letter was written a few days afterwards by the defendants in these terms, "We beg to intimate to you that owing to the war no sugar can be shipped from Java without war insurance being effected on payment of extra war rates. We shall thank you to intimate to us if you are prepared to take the sugar on payment of the extra war insurance rates charged therefor. Unless we hear from you within 24 hours agreeing to pay the extra war insurance rates we shall take it that you have cancelled the July to December portions of the above contract which has been ready for despatch from Java." The answer to that from the plaintiff was, "I write to inform you that I am bound by the contract under which I purchased and you have sold me the sugar and that I am prepared to carry out all and only such obligations as are included in the terms of the contract." On the 13th the defendants wrote "Unless you give us a definite reply to whether you accept the condition within two days, we shall consider the contract as cancelled." On the 14th the plaintiff replied practically confirming what he had already said that he stood by his contract. On the 18th he wrote complaining 'that he had not yet received notice of arrival of his July shipment of sugar purchased from the defendants under contract No. 503.' On the 18th of August, the defendants wrote as follows, "With reference to your letter of the 14th and 18th instant, we regret we cannot add anything now to what we wrote to you on the 13th instant. Please note that we have already cancelled your contract. Further correspondence with regard to the said contract will be useless." Now, upon that, the first point that was raised by the learned Counsel for the defendants was that that was a repudiation of the contract and that the repudiation took effect from the 15th of August, basing their argument upon the letter of the 13th of August in which they said "unless you give us a definite reply to whether you accept the condition within two days we shall consider the contract as cancelled." It has been argued on the part of the plaintiff that that was not a definite repudiation and that it gave time for further consideration, further correspondence and further negotiations, and if the defendants had chosen to go back upon

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what they said in the letter of the 13th of August they could have done so. I think the plaintiff is right upon that point, and that the letter of the 13th August was not a sufficiently definite statement of repudiation, and as a matter of fact the actually definite repudiation was not made until the 18th of August, 1914. That letter of the 18th, was delivered between 6 and 7 p. m. of the 18th, and I do not think it can be seriously disputed that it was too late for the plaintiff to do any thing on that day. Therefore, the matter stands in this way, that on the 18th of August the defendants repudiated their contract and definitely told the plaintiff that they were not prepared to carry it out any further. Therefore, there was a breach of the contract on the part of the defendants, and the question arises to what damages the plaintiff was entitled.

Now, such a question as this in my experience nearly always gives rise to matters which are very difficult to decide, and I do not think that this is an exception in that respect—it does raise difficulty as to the proper measure of damages.

The first point on this part of the case which was raised by the leading counsel for the defendants is this: He argued that although the defendants, the sellers, were entitled to deliver the 300 tons of Brown Java sugar by instalments by shipment in each month, from July down to December, the buyer had not the right to demand delivery by such shipments or instalments but that the sellers if they had chosen could have delivered the whole of the consignment—the whole of the 300 tons in August; or, on the other hand, he could have postponed delivery of the whole 300 tons until the last month specified in the contract. In my judgment that is not a correct construction to be put upon this contract—it is not in accordance with the terms of the contract, nor is it in accordance with the common sense of the matter. I am of opinion that just as a seller had the right to deliver by separate shipments spread over the months from July to December, the buyer in the same way had the right to demand delivery of the goods during those months from July to December. It would be an astonishing proposition from a business point of view that the seller could have delivered by instalments in the way he claimed he had the right to do, yet the buyer was found to take the whole lot at the beginning of the period or at the end of the period. For these reasons, I do not think that the first point raised by the learned counsel was a good point.

The next point that was raised by the learned counsel for the appellant was in respect of the July shipment. The learned Judge who tried the case, in assessing the damages has taken the market

price for the July shipment to be Rs. 7-6, and he has deducted from that the contract price, Rs. 6-6 pies, and has awarded damages upon that basis. It was argued by the learned counsel for the appellants that the learned Judge should have taken a lower rate than Rs. 7-6 annas as the market price. I think there was sufficient evidence to justify the finding of the learned Judge that Rs. 7-6 was the market price in respect of the July shipment, and I do not think there is sufficient reason for disturbing the learned Judge's judgment upon that point.

The next point that was raised by Sir Satyendra is that in assessing the damages, not only ought the July shipment be taken at the ready rate, but the August shipment also ought to be taken at the ready rate. As I understood him, his ground was that inasmuch as the shipper, if he had liked could have delivered the August shipment by the 19th of August, therefore the market rate for the ready goods (I am not sure whether that is the correct way of specifying the matter), what I mean is the market rate for the goods which could be delivered then, ought to be taken in respect of the August shipment. I do not think that that is a sound contention for the reason that the shipper was not found to deliver the August shipment until September, and that until September arrived there would have been no breach of contract (apart from the repudiation) on the part of the seller if he had not delivered the August shipment. I, therefore, do not think it is correct to say that the learned Judge in assessing the damages for the August shipment was bound to take the ready rate.

But then comes the matter which I think is really difficult in this case. That is with regard to the shipments other than the July shipment. The learned Judge has taken the market price as Rs. 8 and he has deducted from that the contract price, Rs. 6-6 pies. Now, with the greatest deference to the learned Judge who tried this case, I cannot bring myself entirely to agree with that part of his judgment which deals with the evidence which was given on behalf of the defendants. The evidence which was given on behalf of the defendants consisted of the evidence of the representative of Messrs. Ralli Brothers, and another gentleman whose name was Manna Lall. I am leaving out the evidence of another witness because both the learned counsel for the appellant have laid no stress upon his evidence. Now, to my mind, there was evidence given which requires very careful consideration. There was first of all the evidence of the representative of Messrs. Ralli Brothers who produced his market rate Book which was made up in the ordinary course, every day at 5 O'clock in the afternoon, and,

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presumably, a gentleman, who represents such a well-known firm as Messrs. Ralli Brothers, goes to the market, makes up his book at the end of each day, is in a position to know what the market rates were, and the entries are made from day to day in the ordinary course. Speaking for myself I think that is most cogent evidence, and further, when I compare the entries in that book, as far as I can, with the entries which were made in the market rate Book of Messrs. Sassoon & Co., namely, with regard to the 15th, 17th and 18th August, I find that the rates which were entered in Messrs. Sassoon & Co's book agree practically with the rates entered in Messrs. Ralli Brother's book, thereby showing that they are *bona fide* business entries. Unfortunately Messrs. Sassoons & Co's entries with regard to the *forward* rates did not go beyond the 18th : but up to the 18th, they do conform to the entries in Ralli Brother's book. Then after the 18th, Messrs. Ralli Brother's entries are in respect of the forward rates for shipments from July to December which is the period specified in the contract, with which we are concerned. Those rates on the 19th August were Rs. 7-7, on the 20th of August Rs. 7-10-11, on the 21st August Rs. 8 for ready, and the rate for forward August—December Rs. 7-14. The learned Judge with regard to that has simply said this, "With regard to the evidence on behalf of the defendant most of the contracts were settlement contracts." Well, it may be so ; the contract to which the witness referred specifically may have been a settlement contract, but I may point out here that with regard to the entries made in the book Ram Coomar Bhakat has said, "there were buyers and sellers in the market for ready and forward goods, otherwise there can be no rates. Then the learned Judge goes on to say, "Messrs. Ralli Brothers' Banian who was examined said that the Rally Brothers were not sellers at the rate mentioned by him. He could not say whether they were sellers at Rs. 8 or not. He said, he did not know. This I find difficult to accept." It seems to me, with great respect to the learned Judge that he has not given sufficient consideration to the very cogent evidence which was put forward by this representative of Messrs. Ralli Brothers in respect of the entries in the book. Further than that, there was evidence given by a witness called Manna Lall who spoke to a particular transaction of the 19th of August "for September to December shipment at the price of Rs. 7-3-0" and with regard to him, the learned Judge says "There was another witness named Manna Lall who purported to give evidence of an actual sale. It is difficult to say from his evidence as to what the nature

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of that transaction was. It seems to me to have been in the nature of a settlement, in which the defendant was concerned." Now, the evidence was that it was *not* in the nature of a settlement, and there was not any ground for the statement that Manna Lall and the defendant were connected in some shape or form with the transaction. These are the grounds for my saying, with great deference to the learned Judge that he has not given sufficient consideration to the evidence on this point. But the matter does not stop there. Supposing I am not satisfied that the evidence of the defendant has been sufficiently appreciated, what is the position? I have got to consider now upon the evidence what are the rights of the parties, and I think that if I were now to proceed upon the evidence which is before me, to assess the damages upon a correct basis and upon the right principle as laid down by the authorities, as far as I understand Mr. Mitter, I should have to come to the conclusion that the plaintiff would be entitled to more damages than the learned Judge has already awarded him, and I will now proceed to say why. The principle upon which the damages should be assessed is this: I am reading from a passage in *Leak on Contract*, 5th Edition, page 638, which correctly states the law on the point, "where there is a contract for the sale and delivery of goods at a future time, or in instalments at future times, a notice by the seller to the buyer of his intention not to deliver may be accepted and acted upon as an immediate breach, and the buyer is *prima facie* entitled to damages measured by the difference between the contract price and the market price at the pointed time or times of delivery, leaving it to the seller to show in mitigation that he could in the interval have obtained a new contract upon better terms, or if the time for delivery has not elapsed when the damages are assessed, the future damages must be estimated prospectively." To make it perhaps a little bit clearer I may read *Roper v. Johnson* (1), where there was a contract to deliver coal during certain months, as in this case, and where the defendant refused to deliver any coal, and the plaintiff brought an action for damages for this breach, it was held that in the absence of evidence on the part of the defendant that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, notwithstanding that the last period had not elapsed when the action was brought, or when the cause was tried. Therefore, I repeat that if I had to begin now

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and assess the damages afresh upon the true basis, I should have to consider, first of all, what was the contract price that was fixed by the contract, and I should have to ascertain from the evidence what the market price was in August, September, October, November and December, and then to subtract the contract price from the market price at the appointed times of delivery in each month, and add the differences together, in order to make out the total amount of damages. It is in evidence that from August the market was a rising market. Then we have the evidence that the market price increased until it rose to something like Rs. 10 perhaps even more, Rs. 10-1-0 anna. Therefore I say that if I had to begin now to assess the damages again, as far as I can see according to the evidence I should have to award to the plaintiff a larger sum than that which he has obtained under the judgment of the learned Judge. Therefore, although I cannot say that the judgment which the learned Judge has given is good with regard to the way in which he has treated the defendant's evidence, I am not in a position to say that the plaintiff ought to be awarded less damage than what the learned Judge has given him. If I had to disturb this judgment, I should have to proceed to assess the damages upon the right principle, and according to the evidence I should have to award to the plaintiff more than what he has already obtained, and for this reason I do not think that it would be right for me to disturb the judgment of the learned Judge.

I think this covers all the points which have arisen in this appeal.

The appeal must, therefore, be dismissed with costs.

Woodroffe, J.—On the question of the market rate we have been asked to say that the finding of the learned Judge that the rate in August and September to December was Rs. 8 is wrong. If the evidence be closely examined it will be found that the only item which directly bears upon the appellant's argument is that which was given by the witness Ram Kumar Bhakat the sugar banian of Messrs. Ralli Brothers. The question in this case is not in my opinion so much the issue whether if we had heard the case ourselves we should or should not have preferred his evidence to that given on behalf of the plaintiff but whether that evidence having been rejected by the learned Judge it is by itself sufficient to enable us to hold that the judgment on this point is erroneous. I refer to the evidence of Ram Kumar Bhakat because the evidence of the witness Narendra Krishna was not relied upon on behalf of the appellant, and the only other witness is the 3rd witness Manna Lall. He states that

on the 19th August 1914 he purchased 50 tons of September to December shipment at Rs. 7-3 from one Janki Dass Bullabux. The rate at which that sale was effected is different from and lower than that given as the market rate on the same date by the witness Bhakat and is a lower rate than that which it is contended by the 12th ground of appeal should have been awarded to the plaintiff. What then is the evidence of Bhakat upon which the appellant's argument rests. He is the sugar banian of Messrs. Ralli Brothers and is certainly an important witness. He states that the rate of ready goods on the 19th August was Rs. 7-7; for forward goods deliverable July to December same rate, and on the 20th August ready goods were quoted at Rs. 7-10 and forward for the same months at the same rate. Now, against this we have it upon the evidence of this witness that there was on the 19th a sale to Messrs. Shaw Wallace & Co. at a rate which was higher than that which is stated to be the market rate on the 19th August and on the 20th August we have a sale to Messrs. Ralli Brothers at Rs. 7-8 which is lower than what was stated to be the market rate for the 20th August. We further have it that when the witness was asked whether if any one wished to purchase from him from the 17th to 20th August he would have sold at the rate at which he had sold to Messrs. Ralli Brothers on those dates. He replied that he could have sold to Messrs. Ralli Brothers and Shaw Wallace & Co., if they wished to buy. But he would not sell to other buyers at this rate. When he was asked at what rate he would have sold to them he made a somewhat vague statement that the rate would depend upon the parties 0-1-0, 0-2-0, 0-3-0 or higher according to the customers. He was further asked whether Messrs. Ralli Brothers whose banian he was were prepared to sell at Rs. 8. With regard to this he says he did not know; he could not say. With regard to this portion of his evidence Mr. Justice Chaudhuri finds some difficulty in accepting it. And speaking for myself I think I should have found some difficulty considering what the position of the witness was, namely, he was the banian of Messrs. Ralli Brothers and so far as the sugar business of Messrs. Ralli Brothers was concerned he was in fact the representative of Messrs. Ralli Brothers. This witness, however, affords strong corroboration to another piece of evidence given on behalf of the plaintiff when he states that the market went steadily up and that the rate upon the day on which he gave evidence was as high as Rs. 10-1-0. Now, the question before us on this matter is one of pure fact. There is evidence which supports the learned Judge's finding, though it is

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true that some of the criticisms which have been passed on it may be said to be well-founded. On the other hand I am clearly of opinion that it is not sufficient to show as it is incumbent on the appellant to show that the evidence before us is such that the finding is so clearly erroneous that it should be reversed.

As regards the question of construction of the contract and that it was not in fact repudiated until the 18th of August and as regards the rate as regards the July shipment I agree with what has been said by the Chief Justice. I have nothing further to add. I agree with him that the appeal should be dismissed.

Mookerjee J.—This is an appeal by the defendant in a suit for damages for breach of a contract, made on the 4th June 1914, for delivery of 300 tons of brown Java Sugar by him to the plaintiff at the rate of Rs. 6-6 per maund. The contract provided that the shipments would be made by steamers during July to December 1914, and that any shipment might be made within seven days after the expiry of the particular month. After this contract had been made, war was declared on the 4th August 1914; six days later, the seller wrote to the buyer and asked him to bear the extra war insurance. The purchaser replied that he was bound by the contract and was prepared to carry out all and only such obligations as were included in its terms. The result of further correspondence was that on the 18th August 1914, the seller intimated to the purchaser that he had definitely cancelled the contract; the present suit was thereupon instituted on the 26th August 1914. The plaintiff claimed damages for the July instalment at the difference between the market rate on the 20th August 1914 and the contract rate. As regards the August instalment, he claimed damages at the difference between the forward rate on the 20th August 1914 and the contract rate. For the later instalments of September, October, November and December, he claimed damages at the same rate. Mr. Justice Chaudhuri has decreed the claim in full. That decree has been assailed before us substantially on two grounds; the first raises the question of the true interpretation of the contract, the second involves the question of the principle on which damages should be assessed.

In support of his first ground, it has been argued that upon a true construction of the contract, the seller was under no obligation to deliver the goods by monthly instalments, and that, in fact, he was at liberty to deliver the goods in one instalment on any date between the 1st July and the 31st December 1914.

This contention is, in my opinion, entirely unfounded. It is well settled that an agreement to accept delivery by instalments, may, in the absence of an express agreement, be inferred from the conduct of the parties and circumstances of the case: *Thornton v. Simpson* (1); *Torling v. O'Riordan* (2); *The Colonial Insurance Co. of New Zealand v. The Adelaide Marine Insurance Co.* (3).

The contract in the present case does not expressly state that the goods were to be delivered in monthly instalments, much less that the instalments were to be of equal quantities. But there are indications in two paragraphs of the instrument, namely, the twelfth and the sixteenth that the parties contemplated delivery in instalments. This, however, is not decisive of the question, whether the buyer could insist upon delivery by instalments; that must be determined with reference to the conduct of the parties and the circumstances of the case. Now, if we look to the correspondence between the parties which preceded the institution of this suit, we find that on the 10th August 1914 the seller referred to "the July and August portions of the contract" which he stated were ready for despatch from Java. On the 18th August, the purchaser referred to "my July shipment of sugar." On the 19th August, the solicitors of the purchaser spoke of the 50 tons which should have been shipped in July, and there is a similar statement in their letter of the 20th August. The second paragraph of the plaint states expressly that the defendant had agreed to deliver sugar to the plaintiff in monthly shipments of 50 tons each, to be made by steamers during July to December 1914. This was not challenged in the written statement, though I do not overlook the comprehensive allegation that whatever was not expressly admitted therein must be deemed to have been denied. An examination of the proceedings before the trial Judge also shows that both parties proceeded on the assumption that the goods were to be delivered in monthly instalments. It is further plain that no business man would read the contract in the way suggested by the appellant; it is impossible to believe that the parties could have intended that the buyer should be entirely at the mercy of the seller and that the latter was at liberty to deliver the goods either in one or in many instalments just as suited his convenience. I hold accordingly that the interpretation which the appellant now seeks to place upon the contract should not be accepted.

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(1) (1816) 6 Taunton 556; 2 Marsh. 267.

(2) (1878) 2 L. R. Ir. 82 (86, 89).

(3) (1886) 12 App. Cas. 128 (138).

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It is further clear that in the absence of any indications to the contrary, as in *Calaminus v. Downais Iron Co.*, (1); the instalment must be deemed to have been intended to be distributed rateably over the period appointed for the delivery of the whole quantity of goods: *Coddington v. Paleologo* (2).

In support of the second ground, which treats of the question of the measure of damages, the judgment of Mr. Justice Chaudhuri has been criticised on the ground that he has not correctly appreciated the evidence and that he has in fact ignored what was weighty evidence in favour of the appellant. Our attention has been drawn specifically to three points in the judgment. First, that it minimizes the effect of the evidence as to the market rates given by the defendant, on the ground that the evidence related to the rates of settlement contracts; it has been pointed out that a similar criticism may validly be directed against the evidence on behalf of the plaintiff which has been accepted and has been made the foundation of the decision. Secondly, the rates for the settlement contracts have not been treated as relevant evidence; it has been pointed out with considerable force that the rates for settlement contract must affect the market rate and must, therefore, afford more or less valuable evidence relevant to the subject under discussion. Thirdly, the evidence of the witness Manna Lal has been disregarded on the ground that he has spoken of a transaction in which the defendant was concerned; it has been conceded that there is no evidence on the record which would justify this statement.

It appears to me upon an examination of these grounds as also the entire evidence on the record that the judgment under appeal is open to valid criticism. That, however, does not justify the conclusion that the decree must be reversed. The question for adjudication is, what is the principle upon which damages should be assessed. If the damages have been assessed upon an erroneous principle, the judgment cannot stand; but it does not follow that the appellant is entitled to a reduction of the amount specified in the decree; he must satisfy the Court that on the correct principle he is not liable for the amount decreed against him.

The principle applicable to cases of this description may be concisely stated. The general principle is that where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for non-delivery. The measure of damages is the estimated loss directly resulting from

(1) (1878) 47 L. J. Q. B. 575.

(2) (1867) L. R. 2 Exch. 193 (197).

the seller's breach of contract. Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they should have been delivered. The principle is lucidly stated by Lord Atkinson in the case of *Wertheim v. Chicoutimi Pulp Co.* (1), "It is the general intention of the law that, in giving damages for breach of contract, the party complaining should, as far as it can be done by money, be placed in the same position as he would have been in, if the contract had been performed. That is a ruling principle. It is a just principle. The rule which prescribes as a measure of damages, the difference in market prices at the respective times above mentioned is merely designed to apply this principle, and as stated in one of the American cases cited, *Grand Tower Co. v. Phillips* (2), it generally secures a complete indemnity to the purchaser. But it is intended to secure only an indemnity. The market value is taken, because it is presumed to be the true value of the goods to the purchaser. In the case of non-delivery, where the purchaser does not get the goods he purchased, it is assumed that these would be worth to him, if he had them, what they would fetch in the open market; and that, if he wanted to get others in their stead, he could obtain them in that market at that price." This principle has been applied to cases in which there is an agreement to deliver goods in instalments and the contract is repudiated before the time for performance arrives. The leading decision on the subject is that in the case of *Roper v. Johnson* (3), which accords with *Frost v. Knight* (4); and *Brown v. Muller* (5). In that case, the defendants contracted to sell to the plaintiffs 3000 tons of coal to be taken during the months of May, June, July and August. The plaintiffs having failed to take any coal in May, the defendants, on the 31st of that month, wrote to the plaintiffs to consider the contract cancelled. The plaintiffs on the next day replied, refusing to assent to this, and sent to take coal under the contract on the 10th of June, when the defendants positively refused delivery. The action was commenced on the 3rd of July. Three propositions were laid down in the case: *first*, that, on the authority of *Simpson v. Crippin* (6), the defendants had no

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(1) (1911) App. Cas. 301 (307).

(2) (1874) 90 U. S. 471.

(3) (1873) L. R. 8 C. P. 167; 42 L. J. C. P. 65.

(4) (1872) L. R. 7 Ex. 111; 41 L. J. Ex. 78.

(5) (1872) L. R. 7 Ex. 319; 41 L. J. Ex. 214.

(6) (1872) L. R. 8 Q. B. 14; 42 L. J. Q. B. 28.

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right to rescind the contract by reason of the plaintiffs' default in not sending to take the May delivery ; *secondly*, that the plaintiffs had elected to treat the positive refusal of the defendants on the 10th of June as a breach of the contract on that day ; *thirdly*, that, in the absence of any evidence on the part of the defendants that the plaintiffs could have gone into the market and obtained another similar contract on such terms as would mitigate their loss ; the measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, although the last period fixed for delivery had not arrived when the action was brought or the cause tried. There is an instructive passage in the judgment of Mr. Justice Brett, as he then was, to which reference may be made. "To entitle a plaintiff to recover damages in an action upon a contract, he must show a breach and that he has sustained damage by reason of that breach. ... The general rule as to damages for a breach of a contract is, that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed. ... Now, although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods, before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of the breach. ... The election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages ; and when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance and not at the time of breach It seems to me to follow that the plaintiffs here did all they were bound to do when they proved what was the difference between the contract price and the market price at the several days specified for the performance of the contract, and that *prima facie* that is the proper measure of damages, leaving it to the defendant to show circumstances which would entitle him to a mitigation. No such circumstances appeared here : There was nothing to show that the plaintiffs ought to have or could have gone into the market—a rising market—and obtained a similar contract." In the case before us, the damages have been assessed on a different principle, and as I read the authorities, on an erroneous principle ; the method propounded by the appellant is equally erroneous. If the damages had been assessed on the correct principle, the evidence shows that the plaintiff would have been entitled to a larger sum than what has been awarded to him. But

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Mr. Mitter has contended that the Court should not now consider a case inconsistent with that expressly made in the plaint. The appellant however cannot invite the Court to set aside the judgment of the trial Judge and make a decree in his favour on what the Court considers an erroneous basis. Nor can the case be sent back, for the remand would be fruitless from the point of view of the appellant; the result will be that the plaintiff will on remand get a larger sum than what has been awarded to him. I hold accordingly that the decree as made by Mr. Justice Chaudhuri should stand.

A. T. M.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice D. Chatterjee and Mr. Justice Chapman.

NABAGOPAL GOSWAMI

v.

SRIGOPAL, *alias* RAMGOPAL BHATTACHARJEE*

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March, 23, 24.

Letters of administration—Grant, order of—Minor heir not made party—Revocation proceeding—Guardian-ad-litem, appointment of—Contentious suit—Minor not being cited nor being properly represented, effect of.

A minor, if not cited nor properly represented in a probate proceeding, is entitled to come in and to have the will proved in a solemn form in her presence.

It is the duty of a Judge, as soon as he is informed of the existence of the minor heir of the deceased in the letters of administration proceeding, to issue notice upon the minor and to have a guardian-ad-litem appointed for her.

Rebells v. Rebells (1) referred to.†

A revocation case is quite a separate case from the probate or letters of administration proceeding.

If a guardian-ad-litem had been appointed in the letters of administration case, it would have been the duty of the Court to proceed with the case as a contentious case in the presence of the minor represented by the guardian-ad-litem. In that case fresh evidence would have had to be taken and an order made upon the contention. A representation of the minor in the revocation proceeding is not effective for the purpose of making an *ex parte* order in the letters of administration proceeding for the grant, an order in solemn form.

* Appeal from Original Decree No. 23 of 1912, against the decree of S. C. Mullick Esq. District Judge of Nadia, dated the 22nd November, 1911.

(1) (1897) 2 C. W. N. 100.

† [See also *Shoroshibala v. Anandamoyee* (1906) 12 C. W. N. 6 (8) and *Dwijendra v. Golek* (1914) 21 C. L. J. 287 (290)—Rep.]

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Appeal by the Petitioner.

Application to prove the will in solemn form.

An application was made in August 1896 for letters of administration and in this application the only heir left by the deceased was not named nor was any citation issued upon her. Upon *ex parte* evidence of another brother of the applicant, letters of administration were ordered to be granted. Immediately thereafter the learned Judge was informed by an anonymous letter that there was a daughter in existence and that the will was not a genuine one. The learned Judge then issued notice upon the maternal uncle and the maternal grandmother of the daughter of the deceased. The maternal uncle then made an application on his behalf for the revocation of the letters of administration which had not then been issued. He then made an application for the appointment of a guardian-ad-litem of the minor and an order to that effect was made. Then a few days after, the maternal uncle made an application for withdrawing his application for revocation on the allegation that he had made enquiries and had been satisfied that the will was a genuine one. Upon this application being made, the maternal uncle's revocation case was struck off and letters of administration were issued. The minor on attaining majority objected to the grant.

Babus Ram Chandra Mozumdar, Brojo Lal Chakraburty, Gobind Chunder Chakraburty, Herambo Chandra Guho and Bhudhar Halder for the Appellant.

Babus Provas Chunder Mitra and Baranasibasi Mukerjee for the Respondent.

The judgment of the Court was as follows :

March, 24.

This appeal arises out of an application for revocation of letters of administration granted to one Ram Gopal Bhattacharjee in respect of the will by one Raghupati Bhattacharjee, his deceased brother. An application was made in August 1896 and in this application the only heir left by the deceased was not named nor was any citation issued upon her. Upon *ex parte* evidence of another brother of the applicant named Sripati Bhattacharjee letters of administration were ordered to be granted. Immediately thereafter, the learned Judge was informed by an anonymous letter that there was a daughter in existence and that the will was not genuine one. The learned Judge then issued notice upon the maternal uncle and the maternal grandmother of the daughter of the deceased. The maternal uncle Durga Das then made an application on his behalf for

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the revocation of the letters of administration which had not then been issued. Durga Das thereafter made an application for the appointment of a guardian-ad-litem of the minor and an order to that effect seems to have been made. Then a few days after, Durga Das made an application for withdrawing his application for revocation on the allegation that he had made enquiries and had been satisfied that the will was genuine one. Upon this application being made Durgadas's revocation case was struck off and letters of administration were issued.

It is contended by the learned vakil for the respondent that this was tantamount to a contentious proceeding in which the minor was represented, that in fact the application was made on behalf of the minor herself and that after attaining majority she was not entitled to object to the ultimate grant that was made. But the difficulty that we find in accepting this contention is this, namely that as soon as the learned Judge was informed of the existence of the minor heir of the deceased in case of intestacy, it was his duty to issue notice upon the minor and to have a guardian *ad litem* appointed for her. It was so held in the case of *Walter Rebels v. Maria Rebels* (1). It is stated in that case that if an application is made for the probate of a will which affects the interest of a minor, the proper course is to serve the minor with a notice and have a proper guardian *ad litem*, appointed for him. Now in this case, it is admitted that the minor was not served with notice. It might be that the service of notice on the minor who was then living in the custody of the applicant for letters of administration would not have been of much use still there was that want of notice. There was, however, that order for the appointment of a guardian *ad litem* but the appointment was made in the revocation case which was a quite separate case from the probate case. If this guardian *ad litem* had been appointed in the probate case it would have been the duty of the Court to proceed with the case as a contentious case in the presence of the minor represented by her guardian *ad litem*. In that case fresh evidence would have had to be taken and an order made upon the contention. That has not been done. Therefore the representation by Durga Das cannot be said to have been effective for the purpose of making the order ultimately passed, an order in solemn form.

Another application was made by another relation of the minor named Nakuleswar Bhattacharjee on the same allegation as was made by Durga Das. In this case Ram Gopal put in a written

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statement. Therein he stated that this Nakuleswar was indebted to the deceased testator and tried to get himself discharged from the debts due to the estate and failing therein he threatened to harass him with litigation regarding the will. There is evidence in this case by a nephew of Nakuleswar to the effect that Nakuleswar was made to give up that proceeding ultimately when it was before the High Court on the consideration of his getting back all the ornaments which he had pledged with Raghupati and of his being paid a certain sum of money. There is no order in the lower Court by which Nakuleswar, was allowed to proceed as a next friend of the minor and in its absence we do not think that the interests of the minor were properly represented by Nakuleswar or that the minor was at all represented in this litigation. If the minor was neither cited nor properly represented in this litigation, she is entitled to come in and to have the will proved in solemn form in her presence. If the will is a genuine one, it will be proved in her presence. Of course there may be paucity of evidence on account of the lapse of time but however great the lapse of time may be, such evidence as is available will be considered and such an order made as will have no reason for the complaint that the case of the minor has never been properly placed before the Court.

In this view of the case we think that the Court below should have made an order for revocation and ordered the will to be proved in solemn form.

The appeal is, therefore allowed, and the decree of the lower Court is set aside. Costs of this appeal will be costs in the cause. We assess the hearing fee at three gold mohurs.

A. T. M.

Appeal allowed.

Before Mr. Justice N. R. Chatterjee and Mr. Justice Mullick.

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SHYAM LAL GHOSH AND OTHERS

v.

RAMESWARI BOSU AND ANOTHER*

February, 18, 19,
 22, 25, 26.
 March, 4, 5,
 8, 9, 11.
 June, 4.

Probate—Application for revocation—When to be made—Reversioner, if can apply—Acquiescence—Delay—Compromise—Family settlement—Will, thirty years old, proof of.

* Appeal from Original Decree No. 178 of 1912, against the decree of A. Majid Esq. District Judge of Rajshahye, dated the 22nd April, 1912.

Although there may not be a fixed time within which an application for revocation of a probate may be made and although there may not be acquiescence, a person may be debarred by long delay in making such an application.

A reversioner can apply during the lifetime of the widow, for a revocation of the will.

The rule that a will more than thirty years old may be read in evidence without proof of its execution, is inapplicable to proof of a will in the probate Court.

There is a distinction between a case where the acquiescence alleged occurs while the act acquiesced in, is in progress, and another, where the acquiescence takes place after the act has been completed. In the former case, the acquiescence is quiescence under such circumstances as that assent may be reasonably inferred from it. In the latter case when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him, and mere delay to take legal proceedings to redress the injury, cannot, by itself, constitute a bar to such proceedings, unless the delay on his part, after he acquired full knowledge, had affected or altered the position of his opponent.

Shyama Charan v. Prafulla Sundari (1) followed.

A compromise amounting to a *bona fide* settlement of disputes binds the reversioners quite as much as a decree on a contest. This rule is subject to the qualification that the compromise was made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner.

Mohendra v. Shamsunnessa (2) followed.

A family settlement presupposes that there are *bona fide* claims on either side and an honest settlement after full disclosure of facts on either side.

Where one party secretly and fraudulently obtained probate of a will and the other party wanted to have it revoked, the former agreed to pay a larger annuity, and obtained an admission of the genuineness of the will which might be used against the reversioners :

Held, that under the circumstances, the principle of family settlement did not apply.

Appeal by the Defendants.

Application for probate of a will executed on the 20th March 1878.

The material facts and arguments appear from the judgment.

Dr. Rash Behary Ghosh, Babus Dwarka Nath Chuckerbutty, Krishna Kamal Moitra and Khetra Mohan Ghosh for the Appellants.

Babus Sarat Chunder Roy Chowdhury, Satya Charan Sinha, Bhudhar Haldar and Dharendra Krishna Roy for the Respondents.

C. A. V.

(1) (1915) 21 C. L. J. 557.

(2) (1914) 21 C. L. J. 157 (163).

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Sumr, 4.

The judgment of the Court was as follows :

This is an appeal against an order of the District Judge of Rajshahye revoking the probate of the will of one Ram Lal Ghose which was granted to his two younger brothers the appellant Shyam Lal Ghosh, and Suk Lal Ghose, since deceased (the father of the other appellants) so far back as the 20th March 1878.

It appears that Ram Lal, Shyam Lal and Suk Lal were three brothers, members of a joint Hindu family governed by the Dayabhaga school of Hindu Law. They had a first cousin Basanta Kumar, who was also a member of the joint family. They had ancestral family dwelling house at Basuarh in the district of Jessore. They also had a residence at the Rampore Boalia, the head-quarters of the Rajshahye district where Basanta Kumar was a Mukhtear; Shyam Lal was a revenue agent and Suk Lal served as a Treasurer in the local Collectorate. Ram Lal Ghosh, the eldest did not do any business at Rampore Boalia. The evidence is conflicting as to whether he ordinarily used to reside at Rampore Boalia or at Basuarh, but there is no dispute that he lived at Basuarh for at least a year and a half before his death.

The family has substantial landed properties in the Rayshahye district, and some properties of small value in the Jessore district, the income of which, in Ram Lal's share was Rs. 39, a year. They had also some money-lending business.

Ram Lal is said to have executed the will at the ancestral residence at Basuarh in the District of Jessore. At the time he was 39 years of age, and had his wife Haramoni and three daughters, Kadambini, Rameswari and Parameswari. He had no son. The eldest daughter Kadambini was then about 13 years of age, and was married, and the other two were about 6 and 3 years of age respectively and were unmarried.

The will gave away the whole of the properties in the Rajshahye district which constituted the bulk of the estate to the two brothers Shyam Lal and Suk Lal absolutely to the exclusion of his widow and daughters. So far as the widow was concerned, the will recited that although the brothers had "promised to give her maintenance and help her in the performance of meritorious acts it was necessary to make a separate provision for her maintenance and for the expense for her performing meritorious acts (so that in case there is disagreement between her and my brothers' family there may not be trouble to her)" and directed that she would get the *income* of his share of the ancestral and self-acquired properties in the district of Jessore, and on her death the daughters would continue to get the

same, but that "so long as any of my said two brothers or any in the line of their sons is alive, my wife or my daughters or any other future heirs of mine besides getting the annual income of the said properties will not be entitled to bring the said properties into their possession or transfer them in any way." The widow was to enjoy and possess the movable properties in the share of Ram Lal but after her death they would come to the possession and enjoyment of the two brothers. She was to have the right of residence with the daughters in the west facing building without any power of alienation but on her death, the same would go to the brothers and their successors.

The will then provides that the daughters would get a legacy of Rs. 50 each and the widow would also get Rs. 50 for 'performing meritorious acts,' out of the money-lending business in the name of the testator and in the joint names of the testator and his brothers in the districts of Rajshahye and Jessore, and they would not be liable for the debts due by the testator and his brothers. The brothers would be entitled to the remaining amount of the money-lending business due to the share of the testator, and the widow and daughters would not be entitled to claim any portion thereof.

With regard to the marriage of the two unmarried daughters, it is stated in the will that "the brothers had promised to marry my said two daughters to suitable bridegrooms belonging to the same social rank as ours at suitable expenses and giving suitable gifts by way of ornaments and bedding etc., to the bridegrooms. Particularly the eldest daughter was married by the said two brothers, therefore I do not make any separate provision for the marriage of my said two daughters." The two brothers were appointed executors of the will.

The will is said to have been executed on the 26th July 1876, and Ram Lal died on the 6th of December of the same year at Basuarhi. Application for probate was made by Shyam Lal and Suk Lal for probate of the will on the 14th May 1877 in the Court of the District Judge at Rajshahye. No mention was made in the application, of Ram Lal having left a widow or daughters, nor was any citation issued upon them. No one appeared to contest the will. Two of the attesting witnesses to the will, viz, Parbati Charan Dutt, and Ram Gopal Ghosh were examined to prove the will and probate was granted to Sham Lal and Suk Lal on the 20th March, 1878.

It appears that shortly after Ram Lal's death, the brothers applied for registration of their names in the Collectorate under

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the Land Registration Act, and their application was allowed on the 15th July after probate was obtained by them. Ram Lal's widow Haramani and the daughters continued to live jointly with Shyam Lal and Suk Lal's family: Kadambini the eldest daughter became a widow about 13 months after Ram Lal's death.

On the 24th July 1881 Haramani for the first time made an application to the District Judge of Jessore for a succession certificate to recover certain debts alleged to be due to her husband, the aggregate amount whereof was Rs. 91.

The application was opposed by Shyam Lal and Suk Lal who set up the probate obtained by them, and Haramani withdrew her application.

The second daughter Rameswari was married to one Durgadas Bose in 1883, and on the 29th April 1884 Haramani applied for revocation of probate in the Court of the District Judge of Rajshahye. The case came on for hearing on the 1st August 1884, and after one witness had been examined on her side the hearing was adjourned and on the 26th August 1884 a petition was put in by Haramani admitting the genuineness of the will, and the Court disallowed the application for revocation accordingly. On the previous day however two ekrars were executed one by Haramani in favour of Shyam Lal and Suk Lal and the other by the latter in favour of Haramani, under which Shyamlal and Suk Lal agreed to pay Rs. 425 a year to Haramani in addition to the income of the Jessore properties for her life and on her death to pay her daughters and their heirs Rs. 300 a year. There were some other provisions which will be dealt with later on.

Haramani thenceforth lived separately from her brothers-in-law's family in a portion of the dwelling house at Basuarhi. There was some further litigation between Haramani and her brothers-in-law subsequently in the district of Jessore which will be referred to later on.

The youngest daughter Parameshwari was married to one Brojendra in April 1886. Haramani died on the 3rd August 1899 and the present application for revocation of the probate was made by Rameswari and Parameshwari on the 27th April 1910, on the ground that the will was forged, that there was concealment of material facts in the application for probate, and there was no citation upon the petitioners or their mother.

Parameshwari's husband Brojendra died in 1911 when the case was pending in the Court below, but both Rameswari and Parameshwari have sons, and they alone are the heirs of Ram Lal

on the death of Haramani, as Kadambini became a sonless widow in her mother's life-time.

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The application was opposed by Shyam Lal and the sons of Suk Lal (Suklal having died in 1906) on various grounds and it was tried as a contested suit. The learned District Judge overruled the contentions raised by the defendants, found that the will was not genuine, and accordingly revoked the probate.

The defendants have appealed to this Court.

It has been contended on behalf of the appellants, *first*, that an executor cannot be called upon to prove a will in solemn form thirty years after probate is granted in common form, *secondly*, that even if the expiry of thirty years is no bar, the will should be presumed to be genuine after thirty years, and the onus is upon the plaintiff to prove that the will is not genuine, *thirdly*, that the present application for revocation is barred by the dismissal of Haramoni's application for revocation; *fourthly*, that the compromise entered into by Haramoni was a *bona fide* one and was by way of family settlement, and is binding upon her daughters the plaintiffs; *fifthly*, that the plaintiffs are precluded by long delay and acquiescence from challenging the will, and *lastly* that the will is genuine. The above contentions except the first and second were raised before the Court below and were overruled by it.

As regards the first contention, we have been referred to a passage in Williams on Executors, 10th Edition, at page 242, which runs as follows:—"The difference between the common form and the solemn form with respect to citing the parties interested, works this diversity of effect, viz., that the executor, of the will proved in common form may, at any time within thirty years be compelled by a person having an interest to prove it *per testes* in solemn form." But it appears from the cases cited in the notes in the same page that there is no such fixed rule. For instance in *Hoffman v. Norris* (1), reported in a note to *Newell v. Weeks* (2), Sir William Wynne said, "I do not know that there is any specific time that limits a party," and in *Merryweather v. Turner* (3). Sir Henry Jenner Fust recognised the "full right of the next of kin to call upon executors to prove a will in solemn form notwithstanding there shall have been lapse of time notwithstanding acquiescence, notwithstanding the receipt of legacy."

In this country it has been held that an application for revocation is not governed by article 178 of the Limitation Act :

(1) (1805) 2 Phillim. 231n.

(2) (1814) 2 Phillimore 231.

(3) (1843) 3 Curt. 802 (817).

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see *Kashi Chundra Deb v. Gopi Krishna Deb* (1) and though we have not been able to find any case in which an application for revocation was made after 30 years, in the case of *Durgagati Debi v. Saurabini Debi* (2) the application for revocation was made 27 years after probate was granted, and the application was disallowed not upon the ground of delay but upon other grounds.

We are of opinion that there is no time fixed for an application for revocation of probate.

As regards the second contention we were referred to *Doe Dem Oldham v. Wolby* (3). In that case it was held that a will more than 30 years old may be read in evidence without proof of its execution, although the testator has died within 30 years, and some of the subscribing witnesses are proved to be still living. In that case however the question was whether the will could be used as evidence of a certain fact in suit for ejectment, without proof of its execution. It was not a case of proving a will in a Court of probate. If the rule were applicable to a probate Court, it would not be necessary to prove wills executed 30 years before the death of the testator, nor in cases where 30 years have elapsed from the death of the testator. We are unable to hold therefore that the rule applies to proof of a will in the probate Court. Besides section 90 of the Evidence Act merely says that in the case of a document 30 years old, the Court *may* raise presumptions mentioned in it, not that it must do so. Where the genuineness of the document is for any reason doubtful it is open to the Court to reject it however ancient it may be. In the present case the Court has referred to suspicious circumstances and has found that the will is not genuine.

The first and second contentions must accordingly be overruled.

The third contention is that the present application for revocation is barred by the dismissal of Haramani's application for revocation. It is not disputed that the plaintiffs as the daughters of Ram Lal had the right to call upon the executors to prove the will in solemn form in their presence, but what is contended for is that the widow having made an application for revocation and the application having been dismissed, it is no longer open to her daughters the plaintiffs, to make a similar application again. No doubt Haramani as a Hindu widow represented the estate of her husband and the plaintiffs as the reversioners would be bound by any decree fairly and properly obtained against her. But there was

(1) (1891) I. L. R. 19 Calc. 48.

(2) (1906) I. L. R. 33 Calc. 1001.

(3) (1828) 3 B. & C. 22.

no trial of the revocation case and no decision by the Court. Haramani admitted the genuineness of the will and prayed that the probate might be upheld under circumstances which we will presently discuss. Behind the application there was a compromise effected by the ekramamas and the learned pleader for the appellants relies more upon the compromise than upon the order dismissing the application for revocation, and this brings us to the fourth contention, *viz.*, whether the compromise arrived at between Haramani, and Shyam Lal and Suk Lal is *bona fide* and binding upon the plaintiffs. A number of cases were discussed before us, upon the question whether a compromise entered into by a Hindu widow is binding upon the reversioners. Most of the earlier decisions are in favour of the respondents' contention, that a compromise effected by a Hindu widow is not binding upon the reversioners, but having regard to the recent decisions of the Judicial Committee in *Khuni Lal v. Gobinda Krishna* (1) and *Mussammat Hiran v. Mussammat Sohan* (2), the earlier view, we think, cannot be maintained. It is true, the Judicial Committee in an earlier case, *Imrit Konwar v. Rup Narain* (3), held, "it is clear that the daughters could not be bound by a compromise made by the widow under any circumstances," but it seems to us that those observations must be taken to have been made with reference to the particular facts of that case. We have considered the cases on the point; and we are unable to hold that a compromise made by a Hindu widow is not binding upon reversioners under any circumstances, as contended for on behalf of the respondents.

The latest case on the point in our Court is that of *Mohendra Nath v. Shamsunnessa* (4), which states the result of the authorities.

In dealing with the contention in that case, *viz.*, that the withdrawal of an appeal from a decree dismissing the suit of the female holding a Hindu widow's estate was in the nature of a compromise and destroyed the conclusive character of the original decree, which thereupon ceased to be operative as a contested decree, Mookerjee J. observed as follows :—"This view cannot possibly be sustained for, as was pointed out by the Judicial Committee in *Khuni Lal v. Gobind* (1), and *Hiran Bibi v. Sohan Bibi* (2), a compromise amounting to a *bona fide* settlement of disputes will bind the reversioner quite as much as a decree on a contest; in other words that

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(1) (1911) L. R. 38 I. A. 87.

(2) (1914) 18 C. W. N. 929.

(3) (1880) 6 C. L. R. 76.

(4) (1914) 21 C. L. J. 157 (163).

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the principle laid down in *Katama Nachier v. Raja of Shivagunga* (1), is not limited to decrees in suits contested to the end. This rule is subject to the qualification that the compromise was made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner: *Tarinee v. Watson* (2); *Indro v. Abdool* (3); *Upendra Narain v. Gopee* (4); *Sambasiva v. Venkataswara* (5); *Kambinayani v. Kambinayani* (6); *Rajlaxmi v. Kalyayani* (7). The view cannot be defended on principle that a qualified owner like a Hindu widow, daughter or mother is bound at her peril to pursue a litigation in respect of the estate in her hands, unremittingly to the ultimate Court of appeal and she cannot *bona fide* effect a settlement of the matter in controversy, even though such compromise be in the best interest of the estate."

We have therefore to see whether the principles relating to compromise by a Hindu widow stated above are applicable to the facts of the present case, and we accordingly proceed to consider the relative positions of the parties, the circumstances under which the compromise in the present case was effected, and the history of the case leading up to it.

Ram Lal was a member of a joint family possessed of immovable properties of substantial value, the bulk of which was situated in the district of Rajshahye. The defendants who are in possession and enjoyment of the properties have not produced any papers to show what the income of the properties was. The plaintiffs have produced certain road-cess papers submitted by Shyam Lal and Suk Lal in 1902 from which it would appear that the income of *some* of the properties in the Rajshahye District was Rs. 10,000 a year. It is said that the same included properties acquired after Ram Lal's death. Two of the properties however admittedly belonged to the family at Ram Lal's death, and the income thereof amounted to Rs. 6,000 a year. As Basanta had a half share in the family properties, the three brothers had an income of Rs. 3,000 a year. The income in Ram Lal Ghosh's share was thus about Rs. 1,000 a year. The very fact that Shyam Lal and Suk Lal agreed to pay Rs. 425 a year to Haramoni by the ekrar indicates that the income must have been substantial. The family had also some properties in the Jessore district, the income whereof in Ram Lal's share was only Rs. 39 a year. They had a money-lending business, but the

(1) (1863) 9 M. I. A. 539.

(2) (1869) 12 W. R. 413.

(3) (1870) 14 W. R. 146.

(4) (1883) I. L. R. 9 Calc. 817.

(5) (1907) I. L. R. 31 Mad. 179.

(6) (1909-10) I. L. R. 33 Mad. 473.

(7) (1910) I. L. R. 38 Calc. 639.

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defendants have not produced any papers to show the amount of money invested in that business. They had also movable properties and residential houses at Basuarh and Rampore Boalia. If there were no will, Ram Lal's widow Haramoni would have been entitled to one-sixth of the entire estate and after her death, her daughters and after them their sons, if any, would be entitled to that share. Now, under the will the widow, and after her death her daughters were to get the income only of the Jessore properties which amounted to Rs. 39 a year, the corpus of those properties even, having been given to the brothers (Shyam Lal and Suk Lal). Haramoni was to enjoy the movables and to have the right of residence in a portion of the family dwelling house at Basuarh without power of alienation, but they were to go to the brothers on her death. The daughters therefore were to get under the will only an annuity of Rs. 39 a year, and a legacy of Rs. 50 each. They had no right to the movables, or any portion of the money-lending business, nor even any right of residence in the family dwelling house. But although the widow and daughters thus were practically deprived of their inheritance, the probate was applied for without citing them. In the application for probate it was not clearly stated where Ram Lal died. Ram Lal, even, according to the defendants, resided at Basuarh for 18 months before his death, but the wording of the application for probate suggested that the usual place of residence of Ram Lal was Rampore Boalia. The value of the assets was not mentioned in the application, and, as already stated the existence of the widow and the daughters was ignored.

The evidence is conflicting as to whether Haramoni and her daughters were at Basuarh or at Rampore Boalia at the time of the application for probate. The plaintiffs have adduced evidence that they were at Basuarh and went to Rampore Boalia about a year after the death of Ram Lal *i.e.*, after the Sapindikaran (the first annual *shrad*) of Ram Lal took place, while the defendants have adduced evidence to show that they were taken to Rampore Boalia shortly after Ram Lal's first *shrad* by Basanta Kumar who had been to Basuarh in consequence, of his mother's illness, some time before Ram Lal's death. The Court below says, "it seems that she was in the same house at the time when the notices were issued but that no steps were taken to give the widow any notice of the probate proceedings." We are inclined to agree with the Court below. It was contended on behalf of the defendants, that if the brothers applied for probate of a forged will, they would have never taken the widow to Rampore Boalia at the time. But if the intention of the brothers was to

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obtain probate fraudulently they might have taken Haramoni to the Rampore Boalia residence purposely, so that if she sought to revoke the probate, her presence at Rampore at the time might be relied upon as showing her knowledge of the probate proceedings. However that may be, Haramoni being a purdanashin lady, would not ordinarily get any notice of the general citation unless she was informed of it by the male members of the family, and there is no doubt that she had no knowledge whatever of the probate proceedings. She lived with her daughters for sometime at Rampore, and then went back to Basuarhi where they lived jointly with the brothers' family in the ancestral house there. Some time afterwards she must have come to hear of the will and in 1881 she applied for succession certificate in the Jessore Court, the brothers opposed it and set up the probate, and she had to withdraw the application. Matters remained in the same state for sometime. Her second daughter Rameswari was married to Durga Das Bose in 1883, and in 1884 she applied for revocation of probate in the Rajshahye Court, so that it was about 6 years after the grant of the probate that the application was made. This delay in making the application has been commented upon on behalf of the defendants. But although we do not believe that Haramoni first came to know of the will in the succession certificate proceeding as stated by her in her application for revocation, the explanation for the delay as given in her affidavit dated the 22nd April 1884 sworn in the Jessore Court prior to her application for revocation appears to be reasonable and should be accepted. In her affidavit she stated (after referring to the succession certificate proceedings) "since then I intended to apply for revocation of the said probate but I am a lady belonging to a respectable family. Particularly I had no means to pay the necessary expenses of the litigation. The opposite party are very influential men in this district. No one ventured to act on my behalf for fear of them. I could not make this application so long. Now having given away one of my daughters in marriage I am making this application with the help of my son-in-law." In her application for revocation of the probate, she stated that her husband had not executed any will, that the opposite party had caused a forged will to be made to deprive her and her daughters of the properties, that the probate had been obtained secretly without her knowledge and without service of notice upon her, and the reasons for the delay in making the application were that the opposite party were very powerful men and had great influence in Rajshahye, and the petitioner not having had sufficient funds in hand could not apply earlier.

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Shyam Lal and Suk Lal were in possession of the entire estate to the exclusion of Haramoni. They had influence at Rajshahye, their father had been a Mukhtear of Robert Watson & Co. their uncle (the father of Basant Kumar) a police Daroga. Basanta Kumar (their cousin) was a Mukhtear and acted for Watson & Co. Shyam Lal himself was also a revenue agent and Suk Lal held service in the Collectorate. Under the circumstances we fully accept the explanation for the delay in making the application for revocation as given by her.

It may be conceded that the application for revocation was made by Haramoni not merely in her own interest but also in the interest of the daughters, but we have to see how it was disposed of.

The application for revocation came on for hearing on the 1st August 1884 and one witness Satish Chandra Ghosh was examined on her behalf and the case adjourned to the 26th August 1884. On that date an application was put in by Haramoni stating "I have now come to know on special enquiry that the will dated the 12th Sraban, 1283 executed by my husband in accordance with the terms of which Srijukta Shyam Lal Ghosh and Suk Lal Ghose have become entitled to some of the properties left by my husband in absolute right, and are executors with regard to some, is genuine and was duly executed by my husband. It is therefore prayed by making this application that the said will may remain in force and in accordance with the order of your Honour dated the 20th March 1878, the probate obtained by the said two Ghosh Mahashayas and the said order granting probate may remain in force." The Court thereupon recorded the following order, "upon being brought up before us, it was certified by the production of a petition of compromise that the case was settled. It is therefore ordered that the objection be disallowed without costs, and a decree be drawn up according to the terms of the compromise."

These two ekrars however, one executed by Haramoni in favour of Shyam Lal and Suk Lal and the other by the latter in favour of the former executed on the previous day (the 25th August 1884) were not mentioned in the application to the Court. It was stated in the ekrarnamas that Haramoni was being maintained as a member of the joint family by her brothers-in-law in accordance with the terms of the will of Ram Lal, but that owing to differences between her and the members of the latter's family, she was desirous of living separately; that as the income of the Jessore properties would be insufficient for her maintenance if she were to live separately, and it being the duty of her brother-in-law to make

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suitable provision for her maintenance and that of her unmarried daughter, and for the performance of religious and meritorious deeds, they agreed to pay her in addition to the income of the Jessore properties, Rs. 300 a year for her maintenance and Rs. 125 for her religious expenses, total Rs. 425 a year for her life, and on her death Rs. 300 a year to her widowed daughter Kadambini so long as she lived, and to the other two daughters Rameswari and Parameswari and their heirs in succession in equal shares. The said amount of maintenance was charged upon certain properties and Shyam Lal and Suk Lal agreed to pay Rs. 300 to Haramoni for the marriage expenses of the youngest daughter Parameswari. Neither Haramoni nor her daughters nor their heirs would be entitled to make any claim for the movable or immovable properties left to her brother-in-law by the will, and if any such claim were preferred in future the terms of the ekrar would be void and inoperative.

There cannot be any doubt that the arrangement was arrived at with the knowledge and consent of Haramoni, specially having regard to the fact that Kalidas Bose the elder brother of Durgadas looked after that case on her behalf and was an attesting witness to the ekrars. It cannot also be said that Haramoni entered into the compromise with the object of defrauding her daughters, although it had the *effect* of defeating the rights of the daughters if it is binding upon them.

The learned District Judge says "It does not appear that she was suitor for the compromise. On the other hand the evidence points to the facts that she was pressed to effect the compromise. She was an illiterate pardanashin widow, and it does not appear that she had friends among persons dwelling in Rajshahye. She executed powers of attorney in favour of four persons in Jessore including a pleader of that district in order to fight out her cause here. She was poor and it was due to the pecuniary assistance which she obtained by marrying her second daughter Rameswari that she was able to institute the case for revocation of the probate in Rajshahye."

There is no direct evidence to show that Haramoni was pressed to compromise the case. Kadambini says that Haramoni told her that at the "entreaties" of her brother-in-law and "at the request of the gentlemen" she had compromised the case, and there is a similar statement made by Haramoni in her plaint in a suit which will be referred to later on. The plaintiffs however have not examined Kali Das Bose or Satish Ghosh, and that fact has been strongly commented upon and we think justly. But the very fact

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that Shyam Lal and Suk Lal agreed to pay Rs. 425 a year in addition to the income of the Jessore properties to Haramoni, when the will itself said to have been executed by her husband gave her an annuity of only Rs. 39 a year, in other words that they agreed to pay more than ten times what her husband himself provided for her by his will indicates that Shyam Lal and Suk Lal wanted to avoid proving the will in Court. There is no doubt that Haramoni herself was poor, whereas Shyam Lal and Suk Lal were rich and had influence at Rajshahye. Haramoni had the pecuniary assistance from Rameswari's husband's family and had Kali Das to look after the case, but so long as Haramoni was alive Rameswari's husband had not the same interest as he has in the present litigation because Rameswari might not have succeeded to the estate of her father if she died during the lifetime of her mother. The learned District Judge says, "it is not unnatural that she, straitened as she was in her circumstances, agreed to have the case amicably settled for what she was provided rather than wait for what she might or might not have obtained in a fight with Shyam Lal and Suk Lal." However that may be, there was the youngest daughter Parameswari an infant of about 11 years of age whose interests were also involved in the case. It is true it cannot be said that the compromise was wholly regardless of the interests of the daughters, but Haramoni whose wants as a Hindu widow were limited was to get Rs. 425 a year for her maintenance and religious expenses and under the will she had a right of residence in the family house and a right of enjoyment of the movables for her life. Rameswari and Parameswari however (who might give birth to sons, as in fact they have) were to get only Rs. 100 a year each, they had no right of residence in the family dwelling house nor the right to enjoyment of the moveables under the will. Parameswari then was unmarried. Shyam Lal and Suk Lal agreed to pay only Rs. 300 for her marriage expenses, and she might not have been married into a family in affluent circumstances. The compromise thus was more beneficial to Haramoni than to her daughters. It is to be noticed that *ekrar* was to be void in case the widow or her daughters preferred any claim to the estate. The question is whether under these circumstances, the compromise is binding on the plaintiffs. In the case in which compromises made by Hindu widows were held binding upon the reversioners, there were disputes relating to properties, there were *bona fide* settlements of the disputes, and the settlements were brought to the notice of the Court which gave effect to them. In some of the cases, the

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compromise was based on the assumption that there was an antecedent title of some kind in the parties, and the compromise merely acknowledged and defined what that title was. Here the questions involved in the revocation case, were whether the probate should be recalled and whether the will was genuine. It was exclusively the province of the Judge to come to a decision on the question whether the will was genuine, and Shyam Lal and Suk Lal and Haramoni could not decide that issue by agreement or compromise between them specially when the reversioners, the daughters, were no parties to the proceedings.

It is true the will had been proved in common form, and probate has already been granted. But Haramoni had applied for revocation of the probate, and she was entitled to have the probate recalled and the will (which she had challenged as forgery) proved in her presence, as she had not been cited in, and had no knowledge of the probate proceedings. Even if Shyam Lal and Suk Lal succeeded in proving her knowledge of the probate proceedings (which is not at all likely), we do not think that the Court, having regard to the facts that she was a purdanashin lady, that the interests of infants were involved and that they were practically deprived of the whole of the inheritance would have refused to recall the probate on that ground. Had the attention of the Court been drawn to the fact that the interests of infants were involved, the vigilance of the Court would have been roused, and having regard to the terms of the will, the circumstances under which it is said to have been executed, the nature of the witnesses, the conduct of the propounders of the will in the matter of obtaining probate, the fact that the existence of the widow and daughters had been suppressed in the application for probate, and the other circumstances of the case the Court might have insisted upon a strict proof of the will, and refused to uphold the will unless quite satisfied as to its genuineness. It seems to us that in order to avoid these difficulties that the compromise was effected out by Court by the Ekrarnamas and admission was obtained from Haramoni that the will was genuine. It is apparent that she did not put in the application because she was satisfied of the genuineness of the will by "special enquiry," but because her brothers-in-law agreed to pay a larger annuity by the ekrar. Had the interests of Haramoni alone been concerned, it did not matter how she proceeded with the case, or how or on what terms she settled it. Ordinarily a compromise of a probate case is binding only upon the parties to it. But Haramoni as a Hindu widow represented the estate, and it is the contention of the appellants

themselves that she represented the interests of her infant daughters though they were no parties to the case. The compromise was arrived at in connection with the revocation case pending in Court, but the ekrarnamas which embodied the terms of the compromise were withheld from the Court, and all that was represented to the Court was that Haramoni was satisfied 'on special enquiry' that the will was 'genuine' and that the probate might be upheld. There can be no doubt that these statements were made at the instance, and in the interests, of Shyam Lal and Suk Lal suppressing the real facts of the case, and the terms of the compromise, from the Court for the purpose of avoiding a trial of the revocation case which involved the interests of the infant daughters.

We have seen that though the interests of the daughters were not entirely disregarded, the compromise was not a fair one so far as the daughters were concerned and cannot be said to be beneficial for the estate which was ultimately to devolve upon the daughters' sons.

Under these circumstances, and those already referred to, we are unable to hold that the principles upon which a compromise effected by a Hindu widow may be held binding upon the reversioners, apply to the present case, or that the compromise was *bona fide* or binding upon the plaintiffs.

It is contended, that it was a family settlement, but a family settlement presupposes that there are *bona fide* claims on either side and an honest settlement after full disclosure of facts on either side. Here one party secretly and fraudulently obtained probate of a will and when the other party wanted to have it revoked, the former agreed to pay a larger annuity, and obtained an admission of the genuineness of the will which might be used against the reversioners. We do not think that in these circumstances the principle of family settlement applies.

The fifth point relates to the question of delay and acquiescence. At the time of the compromise in the revocation case the plaintiffs Rameswari and Parameswari were about 13 and 11 years of age respectively. No question of acquiescence on their part at that time could arise. An attempt however has been made to show that before the compromise was arrived at, a messenger was sent by Haramoni to inform and consult Rameswari and her husband Durga Das about the compromise. One Behary Lal a witness for the defendants professes to have taken the message to Sankarpasa the residence of Rameswari's husband. But Rameswari was then a girl of 13 and her husband Durga Das was a mere youth, and his

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father was alive. We are unable to place any reliance upon the evidence of Behary Lal, and agreeing with the Court below, we hold that the attempt to prove that the compromise was effected with their consent has failed. It is true Kalidas the elder brother of Durga Das was present at the compromise and was an attesting witness to the ekrars, but that cannot be taken as acquiescence on the part of Rameswari who was then a minor. As for Parameswari, she was not married and was a girl of 11 years of age. There could be no question of consulting her and no such suggestion has been made.

Haramoni received the legacy of Rs. 50 each given by the will to her and her three daughters as appears from the statement containing in her plaint in a suit in the Small Causes Court, filed in 1887 against Shyam Lal and Suk Lal.

The defendant's witness Behary Lal Bose says that out of that money Haramoni paid Rs. 50 in cash to Kadambini and gave ornaments to the value of Rs. 50 each to Rameswari and Parameswari and appropriated Rs. 50 to herself and that he (the witness) got the ornaments prepared for them. The story is wholly unreliable, and has been rightly disbelieved by the Court below. There is no reliable evidence that either Rameswari or Parameswari herself ever obtained the legacy of Rs. 50. Shyam Lal admits that after Rameswari and Parameswari attained puberty, no money as provided by the will was given to them by him. Rameswari or Parameswari never admitted the genuineness of the will.

The defendants however relied upon the draft of an ekrar executed by Haramoni in favour of Shyam Lal and Suk Lal by which a suit brought by her against them was compromised. Rameswari and Parameswari were no parties to the suit or the ekrar, but it is said that Parameswari's husband Brojendra took an active part in effecting the settlement and corrected the first paragraph of the draft ekrar which contains an admission of the will. It is stated that the amended first paragraph was written by Brojendra on a slip of paper, and that slip was pasted on the first paragraph of the draft ekrar, as it originally stood. The witness Nibaran Chandra Bose made a note that it was written by Brojendra, son-in-law (of Haramoni), an inhabitant of Nowapara, in the presence of certain persons whose names appear in the note. Nibaran admits that he was not in the service of the defendants at that time, but happened to be present on some other business. A portion of the writing (of the note) admittedly looks different from the other which Nibaran says might

be due to difference of pen and ink. Sham Lal admits that he directed Nibaran to make the note.

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The defendants have adduced evidence to prove that the slip was written by Brojendra and several witnesses have been called by them to prove Brojendra's hand-writing. On the other hand Brojendra's son denied that it was his father's hand-writing. The learned District Judge says, "it does not seem to me to be established that the slip was in the hand-writing of Brojendra. Even if it were I do not think that the recitals in the slip can affect his wife or his sister-in-law."

We agree with the Court below in the view it has taken. Haramoni was bound by the ekrarnama which she had executed in the revocation case, and the fact that one of her sons-in-law, Brojendra, took part in effecting a compromise between her and Shyam Lal and Suk Lal or wrote out a paragraph of the draft ekrar in which Haramoni admitted the will or stated that she was in enjoyment of the income of the Jessore properties in accordance with the said will cannot be construed as an acquiescence on the part of her daughters. Brojendra if he did, what is ascribed to him, did so on behalf of Haramoni, and not on behalf of his wife Parameswari who was no party to the ekrar.

Nor do we think that the fact that Surendra, one of the sons of Rameswari lived with his grandmother Haramoni, or signed some receipts for the money received by her for her maintenance constitutes acquiescence on the part of the plaintiffs. Haramoni so long as she was alive was certainly bound by the ekrarnama, and the fact that one of Rameswari's sons lived with Haramoni or signed the receipts for her does not show that her daughters acknowledged or acquiesced in the ekrar.

The acts and conduct relied upon thus do not in our opinion amount to acquiescence on the part of the plaintiffs. Besides, as pointed out in a recent case in this Court *Shyama Charan v. Prafulla Sundari* (1), there is distinction between a case where the acquiescence alleged occurs while the act acquiesced in, is in progress, and another, where the acquiescence takes place after the act has been completed. In the former case, the acquiescence is acquiescence under such circumstances as that assent may be reasonably inferred from it. In the latter case, when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined obviously on very different legal considerations. A right of action has

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then vested in him, and mere delay to take legal proceedings to redress the injury, cannot, by itself, constitute a bar to such proceedings, unless the delay on his part, after he, acquired full knowledge had affected or altered the position of his opponent. All that can be said in the present case is that there has been delay in making the application as Rameswari and Parameswari being at the time of the compromise, 13 years and 11 years of age respectively, there could be no question of assent or acquiescence on their part at that time.

But although we do not think that the above acts amounted to acquiescence on the part of Rameswari and Parameswari and although there may not be a fixed time within which an application for revocation may be made, yet a person may be debarred by long delay in making such an application. As stated in Williams on Executors, 10th Edition, Vol. 1, page 244, "Long acquiescence unaccompanied by any special circumstances and acts done by a next of kin under the provisions of the will may (if no fact appears which excites a reasonable suspicion of the genuineness or validity of the will) amount to such a waiver of his rights as to preclude him from putting the will in suit."

We have therefore to see whether there were special circumstances in the case so as to take it out of the above rule. It is true that at the date of the compromise of the revocation case (in 1884) both Rameswari and Parameswari were minors, but they attained majority about 20 years ago. They had no right to the estate so long as Haramoni was alive, but they could have as reversioners, during her life-time applied for revocation of the will. Their right however to succeed to the estate was contingent upon their surviving their mother Haramoni. They had no money of their own, and were dependants upon their husbands. The evidence of Rameswari shows that her husband was not willing to incur the costs of an expensive litigation which would be wholly infructuous if she died during the lifetime of Haramoni, and told her to wait until Haramoni's death. The evidence of Parameswari is to the similar effect, and we have no reason to disbelieve this evidence.

Then there are various facts which excite not only reasonable but grave suspicion about the genuineness of the will, and the Court below has found upon the evidence that the will is not genuine. We have not been referred to any case in which the Court having found the will not to be genuine, has refused to revoke a probate granted in common form, on the ground of delay.

Haramoni died on the 22nd July 1909, and the application for revocation was made by the plaintiffs on the 27th April, 1910, about 9 months after the death of Haramoni. Having regard to all the circumstances, we are of opinion that the plaintiffs are not precluded by acquiescence or delay in making this application for revocation.

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The case of *Monorama Chowdhurani v. Shiva Sundari Majumdar* (1), was relied upon. In that case probate was sought to be revoked after 17 years, and the application was refused, but it was found that the petitioner for revocation herself had for a series of years after attaining majority, received the allowance provided for by the will and gave receipts for the same and no reasonable account was given of the circumstances which entitled the petitioner to re-open the probate after so many years. On the other hand in the unreported case of *Srimati Rani Kadambini v. Srimati Rani Dikbasini*, (2) a probate which was granted in 1882 was revoked in 1901. In that case reliance was placed on a long series of deeds from 1882 to 1897 in which there was reference to the will in which the petitioner for revocation took no part, but in the execution of which other members of the family including females joined. The learned Judges held, "this no doubt is a strong point against the plaintiff's case, but it is not we think fatal to it." The Court found her explanation to be correct, and having found the will to be a forged one, revoked the probate.

It is no doubt hard upon the defendants that they have to prove a will 32 years after probate was granted when some of the witnesses are dead. But they had opportunities of proving the will in solemn form, and they did not avail themselves of the opportunities. If it was a genuine will, the executor should have in prudence and for greater security proved the will in the first instance *per testes*. But in the first place they obtained probate in common form without citing Haramoni or the daughters and did not even mention their existence in the application for revocation. Then when Haramoni six years afterwards applied for revocation, they had another opportunity of proving the will, but they avoided it by agreeing to pay her an annuity more than ten times the amount which her own husband had provided for her by his will (if it was genuine). They knew that on the death of Haramoni, her daughters, and on their death their sons would be the heirs and they apprehended that the daughters or their sons might challenge the will, as would appear

(1) (1914) 19 C. W. N. 366.

(2) Appeals from Original Decrees Nos. 317 and 334 of 1901 decided on the 10th May, 1904—unreported.

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from the condition in the ekramama that it will be void and inoperative in the event of the daughters or their heirs challenging the will. In acting in that way they took the risk of proving the will in solemn form when the daughters applied for revocation.

Under the circumstances, the hardship was to a large extent their own creation, and although, having regard to the long time that has elapsed, we must make due allowance in considering the evidence about the genuineness of the will, tried out in this case, we now come to the last question in the case, viz., whether the will is genuine.

[There Lordships then discussed the evidence on the point.]

* * * * *

It was contended on behalf of the defendants that the fact that Haramoni did not apply for revocation of the probate until Durga Das appeared on the scene, and her conduct before and after the revocation case are cogent evidence of the genuineness of the will.

The application for revocation was no doubt made about 6 years after the probate was granted. She at first applied for a succession certificate in the Jessore Court in 1881 and withdrew it when the executor set up the probate. The application was in respect of debts the aggregate amount whereof was only Rs. 91 made more than three years after Ram Lal's death by which time the debts were barred by limitation. There is no doubt that the application was the outcome of some misunderstanding between Haramoni and her brothers-in-law, and was merely a preliminary skirmish to the real fight about the will. We have already held that Haramoni must have become aware of the existence of the will sometime before she applied for the succession certificate in the Jessore Court; but that the explanation given by her for the delay in making the application for revocation is a reasonable one, and should be accepted. It is true she did not object to the registration of the names of Shyam Lal and Suk Lal under the Land Registration Act, based upon the will nor did she apply for registration for her own name as heiress of Ram Lal. But there is nothing to show that she had any knowledge of the land registration proceedings. She admittedly lived as a member of the joint family, and no inference can be drawn under the circumstances against her for not applying for registration of her own name.

After the revocation case was over, she had other litigation with Sham Lal and Suk Lal. In 1887 she brought a suit in the Small Causes Court for recovery of Rs. 135 against Sham Lal and Suk Lal, and it was alleged in the plaint that the defendant had agreed to pay

Rs. 135 for constructing a veranda of the room in which she resided and being unable to pay the same and the legacy of Rs. 200 payable under the will, the defendant had executed a bond in her favour and had paid the Rs. 200 but Rs. 135 was due. A solehnama was filed in this case and the defendant was directed on the 6th February 1888 to pay Rs. 135 within 7 days.

Then on the 15th April 1890 she brought another suit against Sham Lal and Suk Lal for the recovery of the income of the Jessore properties from 1291 to 1296 (1884 to 1889). She stated in the plaint that probate had been obtained by the defendants without her knowledge, that she had applied for revocation of the probate alleging that the will was not genuine and many respectable gentlemen intervened and the matter was settled between the parties to the effect, that the plaintiff would admit the will to have been executed by her husband, that the properties in the district of Rajshahye were to remain in the possession of defendants, that she would get the income of the Jessore properties and $\frac{1}{4}$ th share of the fruits of the garden and of the fish of the tanks in khas possession and a portion of the dwelling house at Basuarh, and that over and above the same she would get Rs. 300 annually for her maintenance and Rs. 125 for religious expenses; that after the terms were embodied in *ekrarnamas* a *solehnama* was filed in that case admitting the will, that the defendant had been paying the amounts fixed by the *ekrar* but had not paid the income of the Jessore properties and accordingly prayed for recovery of the same.

It appears therefore that since the disposal of the revocation case in 1884 to 1889 the brothers did not pay Haramoni the income of the Jessore properties and hence the suit was instituted by her. This suit was also compromised. Defendants made over the entire tank called Haritakitolla to Haramoni for her life; the income of her husband's share in the Jessore properties was settled at Rs. 39 a year, and she was to have the same from the year 1297 (1890), and the defendants agreed to pay the amount due to her for the period in suit in two instalments. Haramoni admitted that her husband had of his own free will executed the will, that the defendant had taken probate of the same and were in possession of the properties covered by the will, and she withdrew the statements made in the plaint with regard to the said will and agreed that she and her heirs would not be competent to raise any objection to the same at any time.

It appears that Haramoni brought another suit under section 9 of Act I of 1877 for possession of the Boitakkhana in the family

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dwelling house at Basuarh. This case too was compromised, the defendands having agreed to pay Rs. 350 to her for construction of a *dardalan* in front of the room occupied by her. In the *ekrar* by which the case was compromised she admitted the will. But all these admissions were made by Haramoni after she had put in the petition and executed the *ekrar* in connection with the revocation case. She was bound by her petition and *ekrarnama* in which the will was admitted and we do not see how these admissions made by Haramoni of the will advance the case for the defendants any further than the admission made by her in the revocation case and in the *ekrar*, or show that the will was genuine. On the other hand it is contended on behalf of the plaintiffs that whenever Haramoni said anything affecting the genuineness of the will or the *ekrar*, she was given something which she was not entitled to, under the will or the *ekrar*. For instance in the second case referred to above, she was given the entire Haritokitolla tank, and in the third the defendant agreed to pay her Rs. 325 for constructing a *dardalan*, to none of which was she entitled under the will or the *ekrar*, and each time an admission was taken from her that the will was genuine and that she and her heirs would not be entitled to challenge it. We think having regard to the circumstances, there is a good deal of force in this argument. In any case, we do not think that these admissions of Haramoni having regard to the circumstances under which they were made, prove the genuineness of the will.

There was one more contention raised before the Court below and also in this Court, viz. that the present application for revocation is not *bona fide*. The Court below over-ruled it for the reasons stated in its judgment. We entirely agree with the Court below on the point.

We have given our anxious consideration to this case as the probate is sought to be revoked after an unusual length of time. The learned District Judge had the witnesses before him, and he has come to the conclusion that the will is not genuine. On a consideration of all the evidence and circumstances of the case, we agree with him in holding that the will is not genuine. The result is that the appeal is dismissed, but having regard to the long delay in making the application for revocation we direct that each party do bear his own costs in both Courts.

A. T. M.

Appeal dismissed.

CRIMINAL REVISION.

Before Mr. Justice Greaves and Mr. Justice Walmsley.

SITAL PRASAD

v.

KING-EMPEROR.*

Indian Penal Code (Act XLV of 1860), Sec. 153A—Code of Criminal Procedure (Act V of 1898), Sec. 108 (b), conviction under—Intention, finding of, if essential.

Although to constitute an offence under section 153A of the Indian Penal Code there must clearly be an *intention* to promote feelings of enmity and hatred, but in order to justify an order under section 108 (b) of the Code of Criminal Procedure what is necessary to be found is that there are words used in the leaflet or matter complained of, which are likely to promote feelings of enmity or hatred; and once those words are found to be present there is no necessity for finding an *intention* on the part of the accused.

U. Dhammaloka, alias Colvin v. Emperor (1) dissented from.

Criminal Revision.

The accused Sital Prasad was convicted under section 108 cl. (b) of the Code of Criminal Procedure by the District Magistrate of Monghyr, for having circulated a leaflet called "*Apna Sanatan Dharam Palchano*" and was directed to execute a bond for Rs. 2000 with two sureties of Rs. 1000 each to be of good behaviour for one year, in default to undergo one year's rigorous imprisonment. Against that order the accused moved the High Court, and obtained the Rule.

Babus Dasarathi Sanyal, Siva Nundan Roy and Rajendra Prasad for the Petitioner.

Mr. S. Ahmad (Dy. Legal Remembrancer) for the Crown.

The judgment of the Court was as follows :—

The petitioner in this case has been bound down under sec. 108 (b) Cr. P. C. We granted a Rule calling on the District Magistrate to show cause why the order should not be set aside on the ground that upon the true construction and interpretation of the leaflet as a whole the Court below ought to have held that it does not contain any matter the dissemination of which is punishable under sec. 153 (A) I. P. C., which necessitates there being an intention to promote feelings of enmity or hatred. On behalf of the petitioner it was contended that even if the matter or some of the matter contained in the leaflet was likely to

* Criminal Revision No. 1168 of 1915, against the order of J. Johnston Esq., District Magistrate of Monghyr, dated the 8th July, 1915.

(1) (1911) 12 Cr. L. J. 248.

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promote feeling of enmity or hatred, there could be no order made under section 108 unless the Court was satisfied that there was an intention in using the words of the leaflet to promote or attempt to promote feeling of enmity or hatred; and we were referred to *Joy Chandra Sarkar v. Emperor* (1) as an authority that for a conviction under sec. 153 (a) there must be a deliberate attempt to excite class against class and an intention to create enmity. We were also referred to a case *Jaswant Rai v. Emperor* (2) which lays down that to constitute an offence under section 153 (a) there must be an intention to promote feeling of enmity and hatred. We were further referred to two English Cases, *Sullivan's case* (3) and *Regina v. Burns* (4). Under the English Common Law, which were cited before us as authorities for the proposition that to constitute an offence under sec. 153 (a) which is said to be founded upon the principle of the English Common Law, there must be intention. The only case to which we were referred which is an actual decision under sec. 108 (a) Cr. P. C. is a case *U. Dhammaloka alias Colvin v. Emperor* (5). It is a case decided in the Lower Burma Chief Court by a single Judge and he without ambiguity lays down the proposition that to justify an order under sec. 108 (b) there must be an actual intention to promote or attempt to promote feelings of enmity or hatred. Our view of the section is at variance with this decision. We think that although to constitute an offence under sec. 153 (a) I. P. C., there must clearly be intention, different considerations arise with regard to the provisions of sec. 108 (b) Cr. P. C. It is true that the words of the section are 'any matter the publication of which is punishable under sec. 153 (a) I. P. C.' But in our view in order to justify an order under sec. 108 (b) one has only got to find that there are words used in the leaflet or matter complained of which are likely to promote feelings of enmity or hatred; and once one has got those words present there is no necessity for finding intention as would be necessary if the person was placed under his trial under sec. 153 (a). If that were not so, there would be no necessity for sec. 108 Cr. P. C. as proceedings would but taken under Sec. 153 (A) I. P. C. The result is that we have simply got to look to the actual words of the leaflet to see if there are words which in our opinion are likely to promote feelings of enmity or hatred. The leaflet as a whole is designed to call

(1) (1910) I. L. R. 38 Calc. 214, (225).

(2) (1907) 10 P. R. 23; 5 Cr. L. J. 439.

(3) (1868) 11 Cox. 44.

(4) (1886) 16 Cox. 355.

(5) (1911) 12 Cr. L. J. 248.

backsliders from the true Hindu faith to a sense of their misdeeds. If the words of the leaflet had been confined to this, there would have been nothing in respect of which the petitioner before us could have been bound down under sec. 108 Cr. P. C. But it seems to us that when we read the leaflet we find that there are passages which go far beyond the object above mentioned if that had been the only object. For instance, there was no necessity to refer, as the pamphlet does, to members of the Mahomedan faith as beef-eaters and destroyers of the Vedas and the Shastras. The passage which specially seems to us unnecessary for the alleged purpose of the pamphlet is as follows :

"Is it proper to observe the festivals and the religious observances of a religion on the basis of which thousands of our temples have been pulled down and the images of our Gods and Goddesses have been burnt for heating *hamams*, for providing hot baths, many places of pilgrimage have been destroyed for the construction of mosques (and mosques built on the sites), crores of beneficial cows have been killed, and crores of ignorant widows or orphans and the helpless are deprived of (degraded from) their religion by misleading and enticement." These facts may be true historically or not, and in the history of any country or of any community or religion there are passages which are best left unrecalled. It seems to us therefore that in this and other passages of the pamphlet there are words which are likely to promote feelings of enmity or hatred between Hindus and members of the Mahomedan religion.

Having regard to this we consider that the order made by the District Judge of Monghyr binding down the petitioner was rightly made.

The Rule is therefore discharged.

A. N. R. C.

Rule discharged.

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Before Mr. Justice Greaves and Mr. Justice Walsley.

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ABDUL ALI CHOUDHURY AND OTHERS

v.

KING-EMPEROR*

*Unlawful assembly, being a member of—Indian Penal Code (Act XLV of 1860),
Sec. 143, conviction under—Code of Criminal Procedure (Act V of 1898),
Sec. 106, order under—Findings necessary to sustain the order.*

A conviction of an offence under section 143 Indian Penal Code of being a member of an unlawful assembly, does not necessarily amount to a conviction of 'taking unlawful measures with the evident intention of committing a breach of the peace' within the meaning of section 106 of the Code of Criminal Procedure. It does however involve an apprehension that a 'breach of the peace' may result. In order to bring the acts of the accused within either of these terms it is necessary that the Magistrate should expressly find that the acts of the person convicted amounted to this, or at all events that the evidence is so clear that without such an express finding a superior Court, such as a Court of revision, should be satisfied that the acts do involve a breach of the peace or an evident intention of committing the same.

Jib Lal Gir v. Jogmohan Gir (1) followed.

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The case for the prosecution was that the complainant purchased at an auction sale certain lands, and inducted one Syam Bap as a tenant on the said lands; that on the 23rd March, 1915, the accused persons, Abdul Ali Chowdhury and 9 others, formed themselves into an unlawful assembly, and came armed to drive away the tenant Syam Bap; and that no body was actually injured.

Accused No. 1, Abdul Ali Chowdhury, pleaded *alibi*, and accused Nos. 2, 3 and 8 pleaded the right of self-defence, and the other accused also pleaded not guilty.

The Additional District Magistrate of Sylhet, before whom the accused were upon their trial, convicted them on the 5th July, 1915, under section 143 of the Indian Penal Code, and sentenced, accused No. 1 to undergo rigorous imprisonment for 3 months, and the rest to 2 months' rigorous imprisonment each; the accused No. 1 was further directed to execute a bond under section 106 of the Code of Criminal Procedure for Rs. 200, with one surety of the same amount, to keep the peace for one year, in default to undergo simple imprisonment for one year, and the

* Criminal Revision No. 1159 of 1915, against the order of H. A. Street, Esq., Sessions Judge of Sylhet, dated the 28th July, 1915, affirming that of W. A. Cosgrave Esq., Additional District Magistrate of that place, dated the 5th of July, 1915.

rest to execute bonds for Rs. 100 each, with one surety each of Rs. 100, to keep the peace for one year, in default to undergo one year's simple imprisonment.

On appeal the learned Sessions Judge upheld the convictions and sentences on the 28th July, 1915.

Against that order the accused moved the High Court, and obtained the Rule.

Mr. A. Rasul and Babu Hemendra Kumar Das for the Petitioners.

Mr. Orr. (Deputy Legal Remembrancer) for the Crown.

The judgment of the Court was as follows :—

The accused in this case were convicted under sec 143 I. P. C. and bound down under sec. 106 Cr. P. C. It has been urged before us that the order under sec. 106 Cr. P. C. is without jurisdiction as there was no finding of any likelihood of a breach of the peace being committed or any evident intention of acts which would involve a breach of the peace. The appellate Court came to no finding upon this point. All that is said in the judgment of the appellate Court is that the appellants formed with others an unlawful assembly with the common object set forth in the charge. In the lower Court the findings are as follows : "The common object of this unlawful assembly was by means of criminal force or show of criminal force to take possession of the plot of land cultivated by Shyam Bap". There is a further finding to this effect : "There can be no doubt that had not Afroz Bukht Chowdhry directed Syam Bap and his other tenants not to resist the accused but to remain quietly in Alphu Moral's *bari*, there might have been a serious riot as Afroz Bukht is, according to the evidence on the record, the leading zemindar in Aurangpur and must have many men under his control. Obviously the accused persons thought that they had their enemy at their mercy as if on account of having been bound down under sec. 107 Cr. P. C., he decided not to resist their attacks they could do what they liked in seizing land by force, while if he did resist their armed attack by sending a similar body of men and a riot ensued, they would be able to get him mulcted of the amount of Rs. 5,000. Various decisions have been quoted before us, but it seems to us that the law is succinctly and accurately laid down in *Jib Lal Gir v. Jugmohan Gir* (1) where it is said that being a member of an unlawful assembly does not necessarily involve a breach of the peace. It does however involve an apprehension that a breach of the peace may result. Nor does a conviction

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of an offence under sec. 143 of being a member of an unlawful assembly necessarily amount to a conviction of 'taking unlawful measures with the evident intention of committing' a breach of the peace. In order to bring the acts of the accused within either of these terms it is necessary that the Magistrate should expressly find that the acts of the person convicted amounted to this or at all events that the evidence is so clear that without such an express finding a superior Court, such as a Court of revision, should be satisfied that the acts do involve a breach of the peace or an evident intention of committing the same. We have already referred to the findings in this case and they do not seem to us to sufficiently and clearly show that the acts for which the accused were convicted under section 143 necessarily involve a breach of the peace or any evident intention of committing the same.

The Rule is therefore made absolute and the order under sec. 106 Cr. P. C. set aside.

A. N. R. C.

Rule made absolute.

Before Mr. Justice Fletcher and Mr. Justice Richardson.

RASHBEHARI LAL MONDAL

v.

TILACKDHARI LAL AND ANOTHER. *

Civil,

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May, 25, 26.

June, 9.

Mustagiri lease of agricultural lands—Lease, not for agricultural purposes—Transfer of Property Act (IV of 1882), if applies to the lease—Suit for rent—Limitation—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 2—Indian Limitation Act (XV of 1877), Sch. II, Art. 116.

The period of limitation applicable to a suit for arrears of rent due under a mustagiri lease of agricultural lands, whether it is or is not for agricultural purposes, is that prescribed by the Bengal Tenancy Act, and not that provided by the Indian Limitation Act.

Per Richardson J.—Where a lease relates to agricultural land but is not a lease for agricultural purposes, it is clearly governed by the Transfer of Property Act which is an Imperial Act, in respect of matters within the scope of that Act. In other respects, however, the relationship between the parties to such a lease may still be subject to the provisions of the Bengal Tenancy Act.

Promotho Nath Mitter v. Kali Prasanna Chowdhry (1) referred to.

Durga Prasad v. Brindaban (2); *Peary Mohan v. Sreeram* (3) and *Burnamoyi v. Burnamoyi* (4) followed.

Appeal by the Defendant.

Suit for recovery of arrears of rent due under two kabuliats.

The material facts will appear sufficiently from the judgment of Fletcher J.

Dr. Dwarka Nath Mitter and Babu Naresh Chandra Sinha for the Appellant.

May, 25, 26.

Babu Chandrasekhar Prasad Singh for the Respondents.

C. A. V.

The following judgments were delivered :

Fletcher J.—The only question raised in this appeal is whether the period of limitation for a portion of the claim is governed by article 2 of schedule III of the Bengal Tenancy Act or Art. 116 of the Indian Limitation Act. The suit was brought to recover arrears of rent due under two kabuliats. The first kabuliati was dated the 23rd of May 1902 and was given in respect of certain properties leased to the defendant for a term of four years (1310 to 1314), at a rent of Rs. 1,200 per annum. The second kabuliati was dated the

June, 9.

* Appeal from Original Decree No. 350 of 1913, against the decree of Babu Dinanath De, officiating Subordinate Judge, 1st Court of Bhagulpur, dated the 28th April, 1913.

(1) (1901) I. L. R. 28 Calc. 744.

(2) (1892) I. L. R. 19 Calc. 504.

(3) (1902) 6. C. W. N. 794.

(4) (1895) I. L. R. 23 Calc. 191.

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15th of January 1906, and was given in respect of certain other properties leased to the defendant for a term of 8 years (1313-1320) at a rent of Rs. 438 a year.

The rent that was in arrears and was sued for was for the year 1313 under the first kabuliat and under the second kabuliat for the years 1313-1318. The defendant's estate was taken charge of by the Court of Wards on the 11th of November 1908, and whilst his estate was under their charge the Collector gave an acknowledgment in writing on the 20th of September 1910 with respect to the rent now sued for.

The only question therefore that arises is with reference to the rent due for the year 1313, for if the period of limitation applicable to the present suit is that provided under Art. 2 of schedule III to the Bengal Tenancy Act then when the Collector gave the acknowledgment in writing on the 20th of September 1910 the rent for the year 1313 was already barred by limitation. The leases in the present cases are expressed to be mustagiri leases. Although a mustagiri lease is sometimes and perhaps usually a lease to a middleman yet in Behar the term is applied frequently to temporary leases instead of the word *thika* (see Land Law of Bengal, by S. C. Mitra, p. 207). The two clauses in the lease that are chiefly relied upon are first the words, "I the Mustagir shall enjoy the *parti* land which may be converted into culturable land in the jamabundi of the said mouza which may be increased till the term of this settlement." The translation is not a very happy one but the meaning seems to be that the tenant may either cultivate the waste land or let it out to tenants and enjoy the increased rental.

The words relied on by the respondent to this appeal are, "Be it known that that in the said mouzas 'you the proprietors have no Kamat lands,' that is lands in the possession of the zemindars.

Now the Bengal Tenancy Act does not define the clauses of leases to which the Act applies. The local extent of the Act is given in section 1 (3) of the Act. It has however always been held that the Act only applies to agricultural land; a class of case however has grown up in the Courts to the effect that the Act does not apply to leases of agricultural land which are not for agricultural purposes: see *Umrao Bibi v. Mahomed Rojabi* (1).

The case of *Promotho Nath Mitter v. Kali Prasanna Chowdhry* (2), was much relied on in argument. The remarks of Maclean C.J., in that case are only to the effect that a putni was not a lease for

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agricultural purposes, and therefore the provisions of the Transfer of Property Act applied as to the merger of the putni on its being purchased. That some of the provisions of the Bengal Tenancy Act, viz., those as to the period of limitation provided by the Act for recovering arrears of rent from the putnidar apply had already been decided in this Court in the case of *Burna Moyi Dassee v. Burna Moyi Chowdhurani* (1). That case remains unaffected by any subsequent decision of this Court. If the period of limitation provided by the Bengal Tenancy Act applies to arrears of putni rent it must also apply to the leases in the present suit even if we accept the construction placed on those leases by the vakil for the plaintiffs. I think however that the leases in the present case even apart from the decision in *Burna Moyi Dassee's* case (1) come under the Bengal Tenancy Act. One of the purposes for which the leases were granted was to authorise the defendant to bring under cultivation the waste land which is, I think, obviously an "agricultural purpose".

That being so I think that the rent sued for the year 1313 is barred by limitation. The decree of the lower Court must be varied by deducting from the decretal amount the amount of rent and interest thereon for that year. Subject to that modification the decree appealed against will be affirmed.

As the appellant has only succeeded as regards the rent for 1313 there will be no order as to the costs of this appeal.

The order of the lower Court as to the costs in that Court will remain unaffected.

Riohardson J.—I agree. It is not always easy to ascertain precisely what the purposes of a lease are and in the present case I doubt whether it is necessary to determine, whether the lease in question is or is not a lease for agricultural purposes within the meaning of section 117 of the Transfer of Property Act. Under clause (3) of section 1 of the Bengal Tenancy Act, that Act extends to the whole of Bengal with the exception of certain specified areas, with which we are not now concerned. The lease covers land to which the Act *prima facie* extends. It has been held however, that there are non-agricultural lands outside the excepted areas to which the provisions of the Act according to their true construction have no application: *Raniganj Coal Association v. Judoonath Ghose* (2); *Umrao Bibi v. Mahomed Rojabi* (3); *Hedayet Ali v. Kamalanand Singh* (4). But the land here is admittedly agricultural land and these authorities therefore are not pertinent. On the other hand where a lease

(1) (1895) I. L. R. 23 Calc. 191.

(2) (1892) I. L. R. 19 Calc. 489.

(3) (1899) I. L. R. 27 Calc. 105.

(4) (1912) 17 C. L. J. 411.

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relates to agricultural land but is not a lease for agricultural purposes, it is clearly governed by the Transfer of Property Act which is an Imperial Act, in respect of matters within the scope of that Act (so far as its operation is not excluded by any thing in its section 2). By way of illustration reference may be made to *Promotho v. Káti Prasanna* (1). Such a lease again can only be made under section 107 by a registered instrument. In this and other cases the Transfer of Property Act has been held to apply. In other respects however the relationship between the parties to such a lease may still be subject to the provisions of the Bengal Tenancy Act : *Durga Prosad v. Brindabun* (2); *Peary Mohan v. Sreeram* (3); *Burna Moyi v. Burna Moyi* (4). The Government have not found it necessary to issue any notification in exercise of the power conferred by section 117 of the Transfer of Property Act and so far as I am aware the position gives rise to no practical difficulty, except the initial difficulty in some cases of determining whether a particular lease is or is not a lease for agricultural purposes, that is to say where the question is whether some provision in the Transfer of Property Act is or is not applicable. That question does not really arise in the present case. The lease here appears to me to be in substance a temporary lease granted to a rent farmer or middleman. It relates, as I have said, to agricultural lands. There is no question of any conflict between the Tenancy Act and the Transfer of Property Act or of applying any provision of the latter Act. The point is whether the period of limitation applicable to a suit for arrears of rent due under the lease is that prescribed by the Limitation Act or that prescribed by the Tenancy Act. The argument for the respondents is that the lease is not a lease for agricultural purposes, and is therefore subject only to the Transfer of Property Act and is not governed in any respect by the Tenancy Act. But in view of the cases cited and of the terms of section 117 itself that conclusion by no means follows from the premise. There is no dispute that if the Tenancy Act applies for any purpose the period of limitation is three years as provided in article 2 of the Schedule III of the Tenancy Act. Section 29 of the Limitation Act contains a saving clause in regard to special and local laws. In my opinion whether this lease is or is not a lease for agricultural purposes the Tenancy Act applies and the period of limitation applicable is that provided by that Act.

A. N. R. C.

Decree modified.

(1) (1901) I. L. R. 28 Calc. 744.

(3) (1902) 6 C. W. N. 794.

(2) (1892) I. L. R. 19 Calc. 504.

(4) (1895) I. L. R. 23 Calc. 191.

Before Mr. Justice Woodroffe and Mr. Justice Richardson.

MADAN MOHAN DE SARKAR AND OTHERS

v.

REBATI MOHAN PODDAR AND OTHERS.*

*Civil Procedure Code (Act V of 1908), Sec. 64, Or. XXXVIII, r 10, scope of—
Attachment before judgment, effect of.*

The object of the provisions in section 64 of the Code of Civil Procedure is to secure to the creditor protection of his rights obtained by the attachment against all subsequent acts of his debtor which may imperil his obtaining the fruits of his decree—through the attachment which has been effected. A creditor can only attach the right, title and interest of his debtor at the date of the attachment, and he has no ground for complaining if prior to his attachment the debtor has created an obligation against him touching the property.

The provision in Order 38, r. 10 of the Code is not limited to rights *in rem*.

A conveyance, therefore, of a property executed after its attachment before judgment by a creditor, in pursuance of a contract dated before the attachment, should prevail, inasmuch as it was merely carrying out an obligation which was incurred prior to the attachment.

Appeal by the plaintiffs.

Suit for recovery of possession of lands.

The material facts and arguments will appear sufficiently from the judgment of Woodroffe J.

Dr. Rash Behary Ghose and Babus Dwarka Nath Chakravarti and Kalikinkar Chakravarti for the Appellants.

Mr. B. Chakravarti, Babus Basanta Kumar Bose, Surendra Nath Guha and Sures Chandra Das for the Respondents.

The following judgments were delivered :

Woodroffe, J.—The facts of this case so far as they are relevant to the findings in the judgment are these : The plaintiffs attached the disputed property before judgment on November 6th, 1895, purchased it at an execution sale on August 19th 1897, and obtained symbolical possession in August 20th, 1898. But on the 25th May 1897, before the execution sale, the defendants had purchased the disputed property by a *Kobala* executed by the Court in pursuance of a contract dated before the attachment. This contract was evidenced by the *bayna patra*, referred to in the judgment, dated the 19th August 1895. It was followed by a suit for specific performance the decree in which was passed on the 30th January 1897.

*Appeal from Appellate Decree, No. 3797 of 1912, against the decree of R. Garlick Esq, District Judge of Dacca, dated the 3rd July, 1912, reversing the decree of Babu Sarat Chandra Sen, officiating Additional Subordinate Judge of that place, dated the 29th of August, 1910.

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Woodroffe J.

The *kobala* which was executed by the Court in the suit for specific performance was executed in pursuance of the aforesaid contract dated before the attachment. The defendants obtained possession before the execution sale at which the plaintiffs purchased.

A number of questions have been argued in the lower Courts and before us. Though it is unnecessary, in the view that we take of this case, to go into all these questions I note them here. In the first place it was objected on behalf of the respondents that the appeal could not proceed in the absence of the heirs of the first respondent Rebati Mohan Poddar, the appeal having been, according to the previous judgment, declared to have abated as regards that respondent. It was next contended that the attachment was invalid for the two reasons stated in the judgment of the lower Court, namely, first by reason of the want of proof that the proceedings were formally in order; and secondly because section 483 of the Civil Procedure Code had, it was contended, no application to an attachment of the present character by a mortgagee to realize his security. It was, however, argued and has in fact been held by the lower Court that even if these were a valid attachment the plaintiff's suit was barred. It was contended on one hand before us by the appellant that the period of 12 years is to be reckoned from the date upon which the symbolical possession was awarded to the plaintiffs. And it is argued on behalf of the respondent that the limitation must run from at least the date when the defendants obtained possession in 1897 under the decree in the suit for specific performance, and that such possession must not be taken to have been, as is contended, possession on behalf of the judgment-debtor but a possession obtained on their own behalf by suit *in invitum*.

The appeal must in my opinion be determined on one of the grounds on which the learned Judge has proceeded in the Court below and with which I now deal. It is true that under section 64 of the Code alienations after attachment are void as against all claims enforceable under the attachment. On the other hand under the provisions of order XXXVIII, rule 10, an attachment before judgment does not affect the rights, existing prior to the attachment. Now, it appears to me that a creditor can only attach the right, title and interest of his debtor at the date of the attachment and that he has no ground for complaining if prior to his attachment the debtor has created an obligation against him touching the property. The object of the provisions in section 64 of the Code appears to me to secure to the creditor protection of his rights obtained by the attachment against all subsequent acts of his debtor

which may imperil his obtaining the fruits of his decree through the attachment which has been effected. I do not think that we are called upon to extend the provisions of section 64 to cases which, it seems to me were never contemplated by the section. After an agreement for sale the rights and duties of the seller were to receive the purchase money and to execute the conveyance.

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It has been argued by Dr. Ghose, that creditors' right in this matter is paramount. This is so as regards all transactions subsequent to the attachment. But it does not seem to me that their right is paramount in the sense that the creditors are able to brush aside every obligation which may have been binding on the debtor prior to the date when the attachment was made. This would place them in a better position than the debtor whose property was attached. It is true that in this case the actual conveyance was executed after the attachment. But this was merely carrying out an obligation which was incurred prior thereto. It seems to me that if we are to hold that the plaintiff as a creditor can ignore the obligations incurred by the debtor, we should use the provision of section 64 for a purpose which was not intended, that provision being for the protection of a creditor against transactions subsequent to the attachment.

It may be noted here that before the plaintiff purchased the property at the execution sale he had had notice of the agreement to sell having been previously impleaded in the specific performance suit to which I have referred. And some portion of the purchase money was paid at the date of the agreement.

It is said that the agreement created no interest in the land itself. This may be so. But neither did the attachment create any interest in the land and the purchase subsequently made at the auction sale was later than the defendant's purchase and subject, as I have said, to the notice of the agreement under which the defendant's purchase was made.

Therefore it seems to me that the natural justice of the case demands that the defendant's purchase should prevail. I do not see any ground for holding that the provision in order 38, rule 10 is limited to rights *in rem*. The section does not say so, and the Judge has not so held. I agree with his conclusion that the defendants had a right to have the contract to sell specifically performed and that under section 489 now corresponding to order 38, rule 10 that right was not affected by the attachment. As he points out, the decree for specific performance was obtained and the sale completed before the attached property was sold to the plaintiff. Accordingly he held,

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and we think rightly, that in the circumstances of this case the defendant's purchase must prevail.

In this view of the case it is not necessary to enter into the other questions raised in the case.

I would therefore dismiss the appeal with costs.

Richardson, J.—I agree upon the point which has been discussed with the conclusion arrived at in the Court of appeal below.

A. N. R. C.

Appeal dismissed.

Before Mr. Justice Holmwood and Mr. Justice Walsmsley.

TEKAIT GANESH NARAIN SAHI DEO

v.

MAHARAJAH PROTAP UDAI NATH SAHI DEO. *

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May, 12, 13, 19.

Chota Nagpur Tenancy Act (VI of 1908 B. C.), Secs. 87, 258, 264 cl. (VIII)—Local Government, rules framed by—Revenue Officer, decision of—Appeal—Judicial Commissioner, if a Revenue Officer.

The Judicial Commissioner of Chota-Nagpur having been specially appointed by the Local Government under section 264 cl. (viii) of the Chota Nagpur Tenancy Act to deal in appeal with the revenue questions decided by an inferior Revenue Officer, is a Revenue Officer within the meaning of section 258 of the Act.

Appeal by the Plaintiff.

Suit for a declaration that the property in dispute, Pargana Barasy, is a hereditary impartible estate of the family of the plaintiff, descendible generation after generation in the male line of the original holder.

The other material facts will appear sufficiently from the judgment.

May, 12, 13.

Dr. Dwarka Nath Mitter and Babu Bepin Chandra Mullick for the Appellant.

Mr. Casperss and Babu Jogesh Chandra Dey for the Respondent.

C. A. V.

* Appeal from Original Decree No. 27 of 1914 (with Civil Rule No. 109 of 1913), against the decree of Babu Sashi Bhushan Sen, Special Subordinate Judge at Ranchi, dated the 1st December, 1913.

The judgment of the Court was as follows :—

This appeal arises out of a suit brought by the plaintiff to have it declared that the entire Pargunnah Barasy is a hereditary impartible estate of the family of the plaintiff and that it is descendible generation after generation in the male line of the original holder and that the right of the second plaintiff to hereditary succession be declared.

It appears that Barasy is one of six Pargunnahs which Cuthbertson in his report states were incorporated with the Chota Nagpur Raj on the assumption of British Rule. The Maharajah has the right to receive the Government revenue but in other respects the so-called Raja for the time being is in the position of a talukdar subject to the custom of primogeniture and impartibility.

The question of resumability by the Maharajah on the failure of direct heirs male is not dealt with by Cuthbertson, but in the Revenue Settlement of 1908 the final publication of which as far as Pargunnah Barasy is concerned took place on the 22nd April, 1909, the plaintiff No. 1 who died after this case was decided in the lower Court was entered in the Record of Rights as holding the Pargunnah as jaagir properties descendible to children generation after generation, and the Maharajah of Chota Nagpur filed a suit under section 87 of the Chota Nagpur Tenancy Act to have this record amended and altered to life jaagir valuing his suit before the Revenue officer at Rs. 10,000. The Revenue officer dismissed his suit in August 1910, but an appeal to the Judicial Commissioner acting under the special powers conferred upon him by section 264 (VIII) of the Act decided that the tenure was not hereditary but resumable and that plaintiff's father had only obtained a life grant from the Maharajah under the written kabuliyat and pottah. This was because Lil Sahi Deo, father of the plaintiff No. 1 Raghaba Sahi, was a very distant collateral who could only succeed on the ordinary right of survivorship under Mitakshara Law, and the Judicial Commissioner held that the tenure was resumable by the Maharajah on failure of heirs male to the last Raja, and that Lil Sahi had no title outside his life grant. The matter was somewhat complicated by the intermediate holding of one Lachminath Sahi Deo who succeeded his half-brother Harnath Sahi Deo and died without issue. This Lachminath has in subsequent litigation been held to be illegitimate and the impartible Raj governed by primogeniture is said to have become resumable on the death of Haranath who also left no heir male of his body. The Maharajah who was later on declared insane neglected his estates and in litigation with

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the Ranis, the widows of Harnath and Lachminath Sahis, wanted to resume the tenure and joined the then holder Lal Sahi Deo, to whom he had given a life interest, as plaintiff. He appears to have admitted the legitimacy of Lachminath for the purposes of that case as the widows of Harnath had consented to act with Lachminath. But whether Lachminath was legitimate or not the direct male line came to an end at his death and the question before the Judicial Commissioner was whether Lal Sahi Deo had a hereditary right to the tenure or whether it was a resumable tenure held under a life grant.

Mr. Kingsford decided this question against Raghubar Sahi Deo the son of Lal Sahi. On this suit brought by the plaintiffs Raghubar, and his son Ganesh Narain plaintiff No. 2, the Subordinate Judge has held that section 258 is a bar and has dismissed the suit on that ground alone.

He was asked also to hold that the decision of Mr. Kingsford operated as *res judicata* under section 11 C. P. C. but he refrained from expressing any opinion on that point.

In appeal before us it is contended that section 258 has no more effect than section 109 of the Bengal Tenancy Act and that a suit to recover or to get confirmation of possession of property valued at Rs. 52,000 cannot be barred by any decision of a Revenue Court which was not competent to try such a suit. Further it is contended that Mr. Kingsford sitting in appeal was not a Revenue officer and therefore section 87 does not apply. Thirdly that plaintiff No. 2 being no party to the suit under section 87 is not bound by it.

The answer to the first contention is that this is not a suit for recovery or confirmation of possession but a suit for a simple declaration of the nature of the tenure which is fully within the competence of the revenue Court. Moreover the suit as laid was incompetent as plaintiff No. 2 had no right to any declaration in the lifetime of his father and the suit was bad for misjoinder of causes of action. The plaintiff No. 2 has acquired his right to sue if any on the death of his father, but on the finding of the lower Court made in his father's lifetime he has no such right.

The second contention is based on what we must characterize as the defective drafting of the Act.

Section 87 provides for a suit before a revenue officer and for an appeal in the prescribed manner to the prescribed officer from decisions passed under sub-section (f), that is, decisions on any other matter not referred to in clauses (a) to (e). The revenue officer

has power to transfer any particular case or class of cases to the civil Court.

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The rules made by Government provide that suits under section 87 shall be tried in all respects as civil suits between the parties. Section 264 (VIII) gives the Government power to prescribe the officer to hear appeals and the Judicial Commissioner is the prescribed officer under the rules. We are asked to hold that the Judicial Commissioner is not a revenue officer within the meaning of section 258 which says that no suit shall be entertained in any Court to vary, modify or set aside either directly or indirectly any order or decree of any Deputy Commissioner or revenue officer in any suit or proceeding under section 87. The definition of a revenue officer in section 3 (XXV) is any officer whom the Local Government may appoint to discharge any of the functions of a revenue officer under any provision of the Act. Now the Judicial Commissioner is specially appointed under section 264 (VIII) to deal with the revenue question decided by the inferior revenue officers in appeal and therefore comes within the definition. It would be a great anomaly to hold that the decision of the Court of appeal was open to be assailed in a suit when the first Court's decision could not be so assailed and the only alternative would be to treat the decision of the Judicial Commissioner as that of a competent civil Court which would have the effect of raising a bar of *res judicata* under sec. 11 C. P. C. We do not think that this could have been the intention of the Legislature. The provisions for appeal appear to have been overlooked in section 258, and we must hold that the special appellate Court in revenue cases is in deciding a dispute under this Act performing the function of a revenue officer. We may further observe that the jurisdiction of the Judicial Commissioner to decide the question that is now sought to be agitated in this suit was decided by a Bench of this Court in Rule No. 5366 of 1911, the judgment in which appears in page 50 of the paper book.

As regards the third contention we think the Judge in the Court below is right. The plaintiff No. 2 had no coparcenary right in the estate which was fully represented by his father in the suit under section 87.

The plaintiff No. 2 being in possession can defend his title in the suit for resumption which is now being brought by the Maharaja of Chota Nagpur. But he cannot by suit seek to vary or set aside the order of the revenue Courts made under section 87. No bar of *res judicata* has as yet been found against him under section 11 C. P. C.

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but his present suit is incompetent for more than one reason. We fix the hearing fee at Rs. 300.

The result is that this appeal is dismissed with costs and the Rule to stay further proceedings in the respondent's suit for resumption is discharged with costs, two gold mohurs.

A. N. R. C.

Appeal dismissed.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

SAFAR ALI AND OTHERS

v.

MOHESH LAL CHOWDHURY AND OTHERS.*

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March, 6, 8.

Title, proof of—Registered deed, non-production of—Oral evidence, if admissible—Evidence Act (I of 1872), Secs. 65 (b), 91—Vendor's admission—Estoppel, plea of.

A vendee of immovable property under a registered deed, if required to prove his title, must do so by the production of the deed or lay the foundation for the admission of the secondary evidence with regard to it. No oral evidence of that sale can be adduced under S. 91 of the Evidence Act.

Lal Achal Ram v. Raja Kazim Husain (1) distinguished.

When a transaction which is avoidable is admitted by the person, who is entitled to avoid it, it cannot be questioned by a third party.

Secondary evidence in the nature of admission by vendor as to sale of immovable property in favour of vendee, cannot, in the absence of conditions mentioned in cl. (b) of Sec. 65 of the Evidence Act, be admitted.

A plea of estoppel which depends on questions of fact, should be put clearly in issue.

Appeal by the Defendants.

Suit for ejectment.

The material facts and arguments appear from the judgment of Mr. Justice Coxe.

Babu Jogendra Nath Mookerjee for the Appellants.

Babu Jyotis Chandra Hazra for the Respondents.

* Appeal from Appellate Decree No. 3083 of 1911, against the decree of S. S. Skinner Esq., District Judge of Purneah, dated the 8th August, 1911, affirming that of Babu Nagendra Nath Dhar, Subordinate Judge of Purneah, dated the 10th September, 1910.

(1) (1905) I. L. R. 27 All. 271; 9 C. W. N. 477.

The judgments of the Court were as follows :

Coxe J.—The land in suit in this case originally belonged to one Bado Mondol. He died leaving three sons, Kalu, Talewar and Akal. It has been found that they succeeded to equal shares in the property and that the shares of Talewar and Akal have come to the plaintiffs although within these shares, there is one share namely $\frac{1}{3}$ th which the defendants held as under-tenants. The share of Kalu has come to the defendants.

The defendants appeal and on their behalf it is argued that the plaintiff's title has not been proved to the one third share of Talewar.

This contention in my opinion must succeed. It is proved that the share of Talewar came ultimately to Giridhari Lal and it is said that he sold it to the plaintiff by a registered deed. That deed, however, is not produced and so far as we know, no foundation has been laid for the admission of any secondary evidence with respect to it. It appears to me therefore that no evidence of that sale can be adduced under section 91 of the Evidence Act and that being so, the plaintiff's title to that share must be regarded as not proved.

The Courts below have held that this defect is cured by the fact that Giridhari Lal supports the plaintiff. That, however, does not justify secondary evidence of the document against the defendants under section 65, clause (b) of the Evidence Act.

Reference has been made to the case of *Lal Achal Ram v. Raja Kazim Husain Khan* (1). That case, however, has no application. The principle laid down in that case, if I understand it aright, is that when a transaction which is voidable is admitted by the person who is entitled to avoid it, it cannot be questioned by a third party. But certainly that case cannot in my opinion be invoked practically to repeal section 54 of the Transfer of Property Act and section 91 of the Evidence Act.

It has been suggested that we should give the plaintiff another opportunity of producing this deed. Seeing, however, that the case was instituted in 1909 and that the absence of this deed has been commented on by both the Courts below, I certainly do not think that the plaintiffs should have another chance of producing a document which they were too negligent to file at the proper time. This point, therefore, must, in my opinion, be decided in favour of the appellant.

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 Cox, J.

The second point taken is that the plaintiffs are estopped from questioning the defendants' rights. Apparently Akal Lal on the same day sold one-third share to one Gora Lal Sahu under whom the plaintiffs claim and another one-third share to Isak Lal under whom the defendants claim ; and the kobala of Isak Lal is recited in that of Gora Lal and *vice versa*. It is therefore contended that the plaintiff who claims under Gora Lal cannot dispute the kobala in favour of Isak Lal. This contention, however, appears to me quite untenable. It is evident from the judgments of the Courts below that this question of estoppel was never put in issue. There appears to be nothing to show that the position of Kalu was in any way affected by the execution of this kobala in favour of Gora Lal. The learned vakil who appears for the appellant is unable to assure us that there is any evidence that Isak Lal would not have bought the land covered by his kobala if the kobala in favour of Gora Lal had not been executed. The main element therefore to justify a plea in estoppel is wanting : and further it is evident that a plea of this nature which ultimately depends on questions of fact ought to be put clearly in issue.

Thirdly, it is contended that the defendants are entitled to retain possession of the land as raiyats. This, however, does not appear to have been seriously contested in the Court below. The Judge says "The defendants Nos. 1 to 4 were also under-tenureholders, but only in respect of the 2 annas 8 pies share of which they had taken settlement from Mohan Lal under the kabuliat." It was argued that the position of the defendants with respect to the lands which they cultivated personally was different from their position with respect to the lands which they let to tenants. But this is clearly erroneous. Their title to these lands was precisely the same and if it failed with regard to the tenanted lands, it must also fail with regard to the cultivated lands.

The appeal will, therefore, be partly decreed and the suit will be dismissed with respect to the $\frac{1}{3}$ rd share said to have descended from 'Talwar. Otherwise the decree of the lower Court will be confirmed. Having regard to the proportion of success, we pass no order as to costs.

Sharfuddin J.—I agree.

A. T. M.

Appeal decreed in part.

Before Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

CHANDRADAYA SEN

v.

BHAGABAN CHANDRA SEN AND OTHERS.*

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December, 15, 22.

Contribution, suit for—Second appeal, if lies—Provincial Small Cause Courts Act (IX of 1887), Sch. II. Art. 41—Indian Contract Act (IX of 1872), Sec. 69—Personal liability—Liability imposed on property—‘Person bound by law to pay’—Interested in the payment of money—Rent payable by the judgment-debtor—Execution purchaser, if can recover—Execution purchaser, liability of, extent of.

The plaintiff sued to recover from the defendants the whole amount paid by him to save the property, a portion of which was held by him as a tenant under defendant No. 1. There was an alternative case, viz. that if the plaintiff was held liable to contribute, then, a decree for proportionate amount might be passed against the defendants.

The primary Court held that the plaintiff was a co-sharer and liable to contribute, and on that footing gave a modified decree to the plaintiff. The plaintiff did not appeal against that decree. On second appeal by defendant No. 2.

Held, that as the suit was one for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer, it was exempted from the cognizance of Small Cause Courts Act under article 41 of the second schedule of the Provincial Small Cause Courts Act, and a second appeal lay to the High Court.

Section 69 of the Contract Act was intended to include the case not only of personal liability, but all liabilities to payments for which owners of lands were indirectly liable, those liabilities being imposed upon the lands held by them.

Mothooranath v. Kristokunur (1) followed.

Plaintiff and defendant No. 1. were co-sharers of a taluk. The share of the defendant No. 1 was purchased by defendant No. 2 in execution of a mortgage decree. Prior to the purchase of the defendant No. 2, the landlord of the taluk had obtained a decree for arrears of rent of the taluk and after the purchase by defendant No. 2 put up the taluk to sale in execution of the rent decree, when the plaintiff deposited the entire amount due to the landlord and saved the taluk :

Held, that defendant No. 2 was a person “bound by law to pay” within the meaning of section 69 of the Contract Act although his liability was not a double liability like that of the plaintiff.

That the plaintiff was a person interested in the payment of money within the meaning of section 69, as he was “bound by law to pay” by reason of the liability attaching to the land.

* Appeal from Appellate Decree No. 1472 of 1914, against the decree of R. E. Jack, Esq., Additional District Judge of Tipperah, dated the 28th February, 1914, affirming that of Babu Prandhan Bhar, Munsiff of Kasba, dated the 18th January, 1913.

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That defendant No. 2, in the absence of anything to denote the contrary, purchased the land charged with the rent which was due in respect of it at the time of its purchase and there being no privity between him and defendant No. 1, the judgment-debtor, he could not recover from the latter the money which he was obliged to pay for the rent so due at the time of the purchase.

Moharane v. Harendra (1) followed. *Gobindo v. Basant* (2) and *Jogemaya v. Girindra* (3) distinguished.

That defendant No. 2 was liable only to the extent of the share purchased by him.

Appeal by Defendant No. 2.

Suit for contribution.

The material facts and arguments appear from the judgment.

Babus Sarat Chunder Roy Chowdhury and *Sasadhar Roy* for the Appellant.

Babus Birendra Chandra Das and *Upendra Kumar Roy* for the Respondents.

C. A. V.

The judgment of the Court was as follows :

The appeal arises out of a suit for contribution.

December, 22.

A preliminary objection has been taken to the hearing of the appeal on the ground that the suit is of a nature cognizable by the Court of Small Causes, and does not come within article 41 of the 2nd Schedule of that Act. It is pointed out that the plaintiff's case was that he was a tenant under the defendant No. 1, and he sued to recover from the defendants the whole amount paid by him to save the property, a portion of which was held by him as a tenant under the defendant No. 1 ; in other words he denied any common liability with the defendants which is the foundation of a suit for contribution. That, no doubt, was the plaintiff's case, but there was an alternative case, viz., that if the plaintiff was held liable to contribute, then, a decree for proportionate amounts might be passed against the defendants.

The Court of first instance held that the plaintiff was a co-sharer and liable to contribute and on that footing gave a modified decree, to the plaintiff. The plaintiff did not appeal against that decree. Under the circumstances we are of opinion that the suit is one for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer, and is exempted from the cognizance of Small Cause Courts under article 41 of the 2nd Schedule of Act IX of 1887. The preliminary objection is accordingly over-ruled.

As regards the merits of the case, it must be held, upon the

(1) (1896) 1 C. W. N. 458.

(2) (1899) 3 C. W. N. 384.

(3) (1900) 4 C. W. N. 590.

findings arrived at, that the plaintiff and the defendant No. 1 were co-sharers of a taluk. The share of the defendant No. 1 in the taluk was purchased by the defendant No. 2 in execution of a mortgage decree in 1908. Prior to the purchase of the defendant No. 2, the landlord of the taluk had obtained a decree for arrears of rent of the taluk, and after the purchase by defendant No. 2, put up the taluk to sale in execution of the rent decree, when the plaintiff deposited the entire amount due to the landlord and saved the taluk. He then brought the present suit for contribution. The Court of first instance passed a decree against the defendant No. 2 and the other co-sharers, and that decree was confirmed on appeal.

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The defendant No. 2 has appealed to this Court, and it is contended on his behalf that as the rent decree obtained by the landlord was for a period prior to the date of his purchase he was not a person "bound by law to pay" (any share of the rent), within the meaning of section 69 of the Contract Act. It is true he was not personally liable for the rent for the period prior to his purchase, but the taluk, a share of which was purchased by him, was liable to be sold in execution of the decree. In *Mothooranath v. Kristokumar* (1) it was contended that the section applied only to cases where there was a personal liability for the debt, and did not apply where, as in the present case, the liability attached to the land only. Markby J. in over-ruling the contention said as follows:—"Now, I think it is rightly argued that taking that section by itself, it is possible to say that that section applies to cases where the person who is there called "the other" was personally liable for the debt, but it is clear from the illustration that that is not the intention of the Legislature. The illustration gives the case of a lessee paying off revenue due to Government, but the liability to pay revenue due to Government is not a personal liability of the Zemindar, but a liability which is imposed upon the Zemindar's land. It is therefore clear that that section was intended to include the cases not only of personal liability, but all liabilities to payments for which owners of lands are indirectly liable, those liabilities being imposed upon the lands held by them."

We agree with the view taken in the above case, and hold that the defendant No. 2 is a person who is 'bound by law to pay' within the meaning of section 69 of the Contract Act.

The learned pleader for the appellant sought to distinguish the case upon the ground that there was no personal liability of either

(1) (1878) I. L. R. 4 Calc. 369.

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of the parties to the case, and that the plaintiff in the present case personally, as well as his share of the taluk, was liable for the rent, and the defendant No. 2 was not personally liable but only his share of the taluk. If however a person is "bound by law to pay" by reason of the liability attaching to the land, the defendant No. 2 comes within the purview of the section although his liability is not a double liability like that of the plaintiff. Besides in the present case the landlord did not proceed against the tenants personally.

It was further contended that the plaintiff was not a person interested in the payment of money but was himself bound by law to pay and that as such he cannot come under the section. But the plaintiff in the case cited above was also 'bound by law to pay' by reason of the liability attaching to the land; and that did not prevent him from coming under the section. The learned Judges held that he was "interested in the payment" of the money because if he had not paid it his land would have been sold, as in the present case. The first contention of the appellant is accordingly over-ruled.

It is next contended that as between the defendant No. 1 and the defendant No. 2, the former ought to have been made liable for the plaintiff's claim, as the decree for rent was for a period prior to the date of the purchase by the defendant No. 2 in execution of his mortgage decree, during which the defendant No. 1 was in possession, and that the Courts below are wrong in making a decree against the defendant No. 2. But as pointed out in the case of *Moharane Dasya v. Harendra Lal Roy* (1) rent is, by operation of law, the first charge on a tenure and a person, who purchases the same at an execution sale, must, in the absence of anything to denote the contrary, be taken to purchase it charged with the rent which is due in respect of it at the time of its purchase and there being no privity between him and the judgment-debtor, he cannot recover from the latter the money which he is obliged to pay for the rent so due at the time of the purchase.

The case has been followed in *Peary Mohan Mukhopadhyaya v. Sreeram Chandra Bose* (2) and *Manindra Chandra Nandy v. Jamahir Kumari* (3).

We have been referred to the cases of *Sreemutty Jogemaya Dassi v. Girindra Nath Mukherjee* (4), and *Gobindo Chunder Chukerbutty*

(1) (1896) 1 C. W. N. 458.

(2) (1902) 6 C. W. N. 794.

(3) (1905) I. L. R. 32 Calc. 643.

(4) (1900) 4 C. W. N. 590.

v. Basant Kumar Chukerbhutty (1). But all that was laid down in the first case was that a purchaser of a tenure is not personally liable for its rent which fell due before the date of purchase, although the tenure may be liable for such rent. In the second case, the appellant, an unrecorded co-sharer of a tenure was held liable to contribute to the rent paid by a recorded co-sharer to save the tenure, although the share of the former had been sold away and purchased by another at the date of the sale in execution of the rent decree. Reliance is placed upon a passage in the judgment in that case which runs as follows:—"It may be that the purchaser of the share could not have come down upon the appellant for any rent which had become due before the purchase, but the question here is not between the appellant and the purchaser, but between the plaintiff, and those who were co-owners with him of the taluk during the period for which the rent became due."

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In the present case, however, the plaintiff does not insist upon his claim against the defendant No. 1, and it is the defendant No. 2 who raises the question of the liability of the defendant No. 1. It is found that the defendant No. 2 purchased the share of the defendant No. 1 at a low price which in the opinion of the Court below indicated that he purchased the share subject to the liability to contribute. No equitable consideration therefore arises in favour of the defendant No. 2.

It is unnecessary to consider whether the defendant No. 1 could be held liable on the basis of the contract (of mortgage) as between him and the defendant No. 2, because the latter never set up such a case. The case of the defendant No. 2 simply was that the debt was a personal liability of the defendant No. 1 and he was bound to pay it, by reason of his having been in possession and in enjoyment of the profits of the share during the period for which the rent was due.

The defendant No. 2 is liable only to the extent of the share purchased by him. But no question was raised in the Courts below that the amount decreed against him exceeds the value of the share purchased by him.

We are of opinion that the decree appealed from should be confirmed, and this appeal is accordingly dismissed with costs, one set of pleader's fees will be divided between the plaintiff and defendant No. 1 respondents.

A. T. M.

Appeal dismissed.

PRIVY COUNCIL.

PRESENT :—*Viscount Haldane, Lord Parmoor, Lord Wrenbury,
Sir John Edge and Mr. Ameer Ali.*

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November, 2.

THAKUR UMED SINGH AND ANOTHER

RAI BAHADUR SETH SOBHAG MAL DHADHA AND ANOTHER.

[APPEAL FROM THE COURT OF THE CHIEF COMMISSIONER OF
AJMER-MERWARA].

Arbitration—Order of reference—Award—Agreement to refer signed by all parties, but application for an order of reference not signed by one of them—Order of reference made in the presence of all parties—Decree made according to award—Revision—Review of order refusing revision—Code of Civil Procedure (Act V of 1908), S. 115, O. 47, r. 1 and Schedule II. Ss. 1, 15 and 16.

Schedule II to the Code of Civil Procedure, 1908 which provides by S. 1 that where the parties to a suit have agreed that the matter in difference shall be referred to arbitration they may apply in writing to the Court for an order of reference, does not require that the writing should of necessity be signed.

Before the trial of a suit all parties thereto entered into an agreement to refer the questions in dispute to arbitration : The agreement was signed by the plaintiffs and defendants each with his own hand, excepting in the case of a minor defendant on whose behalf it was signed by his guardian-*ad-litem* appointed by the Court. The parties appeared before the Court and produced the agreement and applied for an order of reference, and the Court thereupon made the order :

Held, that as the said guardian was in Court and assented to the said application no injustice had arisen, and the said order and the subsequent arbitration proceedings and the award made therein should not be set aside because of the omission to sign the said application by the minor's guardian-*ad-litem*.

Where the Court has rejected objections, under section 15 of schedule II of the Code of Civil Procedure, 1908, to an award and passed a decree under section 16 of that schedule, and an application under section 115 of the Code for revision of that decree is rejected on merits, an order under O. 47, r. 1 of the Code, for a review of the order refusing revision is not justified in the absence of circumstances which would bring the case within the provisions of the said section 15 of schedule II which would enable the Court to set aside the award.

Ex parte appeal by special leave from an order dated the 23rd May, 1912, of the Officiating Chief Commissioner, Ajmer-Merwara.

The plaintiffs-respondents sued the defendants-appellants, in the Court of the Commissioner and District Judge Ajmer-Merwara, to recover a certain amount alleged to be due under a mortgage. The second defendant was a minor and the Court appointed one Bhur Singh as his guardian-*ad-litem*. All the parties including Bhur Singh signed an agreement whereby they agreed

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to refer the matter in dispute to arbitration. The agreement was filed in the Court with an application for an order of reference. It appears that this application was not signed by the minor defendant or his guardian. But the guardian was present in Court along with the other parties and the Court made the order as prayed for. Arbitration proceedings followed and an award therein was made and filed in the Court. The plaintiffs contended that the award should be set aside on the ground *inter alia* that neither the minor defendant nor his guardian-*ad-litem* had been a consenting party to the application for an order of reference inasmuch as neither of them had signed that application. The Court over-ruled the objection and on the 16th May 1911 made a decree according to the award.

The plaintiffs thereupon applied to the Court of the Chief Commissioner for revision, but their application was rejected on the 25th November, 1911.

"The case appears to me to have been decided quite fairly by means of an arbitration, and subsequent reference to an umpire agreed to by both parties. Objections raised by applicant on the ground that the application to the Court for reference to arbitration was not signed by his guardian are unimportant, when the agreement was signed by all parties concerned. Moreover, it is for the minor or his guardian, not the applicant, to raise such objections."

"The same argument applies in reference to the second point raised by the applicant—an agreement or compromise entered into on behalf of a minor without the leave of the Court is voidable against all parties other than the minor—that does not make it necessarily void against the minor.

"As regards the alleged misconduct of the arbitrators and the umpire, there really appears to be nothing on the record to justify or can give colour to the allegation. There is a somewhat vague application dated 10th February, 1911 filed by the plaintiffs, but even then the plaintiffs did not ask the umpire to take any additional evidence. On the whole the arbitrators and umpire appear to have decided the case with care and to the best of their ability, and I see no reason whatever for supposing they were guilty of misconduct. There is no illegality or irregularity in the proceedings, such as would justify revisional interference and the application must accordingly be rejected."

The plaintiffs thereafter applied for a review of the order rejecting the application for revision. That application was allowed on the 23rd May 1912, and the order of reference and subsequent

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proceedings in arbitration and the award were set aside. The material part of the judgment was as follows :—

“Although there are several grounds urged in the petition for review, only one ground was taken up in the argument, namely, that the learned High Court was in error in regarding the omission to sign the application for arbitration by one of the parties as unimportant, and covered by the existence of the agreement between the parties.

“The case rests on the specific law laid down in schedule 2, para. 1 of the new Civil Procedure Code (corresponding with section 506 of the old Code). It is argued that according to this rule non-joinder of all the parties renders the application and all proceedings based thereon illegal and *ultra vires*.

“Mr. Mulla in his commentary writes that ‘if all parties interested have joined in the application, an order of reference will be made under para. 3’ and ‘in order to give jurisdiction to the Court to make an order of reference, ... it is necessary that all the parties interested must apply to the Court.’ These opinions are based on Calcutta High Court rulings 29 Calcutta 167 and 11 Calcutta 37.

“Mr. Banerji in his work ‘Arbitration in India’ (1908) page 73, quotes a Privy Council ruling to the effect that even when the parties consent to waive conditions of law this does not give jurisdiction : and Sir Peter Maxwell at page 579 of his Interpretation of Statutes says that where an act required by statute is precedent to jurisdiction, compliance cannot be dispensed with.

“Mr. Justice Richards in 29 Allahabad, 430, has laid down that Courts ought to be most careful that the provisions of section 506, old Civil Procedure Code, are strictly complied with.

“The learned counsel further argued that the agreement itself could not be taken as equivalent to the application for reference. The High Court might have been influenced by the affidavit that appeared on the record to the effect that the minor had been present in Court when the application was made. But this affidavit was very defective and inadmissible. It does not bear the minor's name or his guardian as one of those who presented it. It has no order of the Court to bring it on the record, and it has been referred to in the lower Court's judgment actually after the Court had itself passed an order, dated 6th May, 1911, to the effect that extraneous evidence about the arbitration being entered on with the consent of all parties, was inadmissible.

“The Judge did not in the proceedings note the fact that the minor was present when the application was presented, and failing that the

affidavit is valueless in evidence, vide Field's Law of Evidence, page 406.

"Counsel further urged that even if the umpire's action had been with proper jurisdiction, it was in itself illegal, as he opened the case *de novo*, whereas all he had to do was to consider the points on which the arbitrators had failed to agree. Nor did he take evidence, though he called for it. He failed to realise that his position was judicial, vide Vol. 79, page 363 L. J. R. (English case). His award had greatly prejudiced plaintiffs, and was improperly given, even if he had jurisdiction.

"I have heard Mr. Bapat's able presentation of the case with much interest, and I have read the rulings above quoted and several others. It is, as before remarked, unfortunate that the other side have not been represented, but this seems to be their own fault. Mr. Bapat's arguments appear to me to be incontrovertible, and I feel sure that my predecessor in office would not have hesitated to accept them as exceedingly strong ones. It is no doubt true that the error in the proceedings is a technical one, but the Court frequently insists on technical accuracy, and it is none the less illegal because it is technical. An error in a point of law is a good ground for review of judgment, and I am of opinion that a good case has been made out for review of this Court's order of the 25th November 1911, which was passed summarily without hearing arguments.

"I accept the application with costs, and in doing so accept the previous application for revision of the lower Court's order. The whole of the arbitration proceedings ordered in the lower Court must be regarded as without jurisdiction, and must be set aside.

"The case stands where it did before reference to arbitration was ordered by the lower Court, and must be proceeded with according to law from that point. Costs in the lower Court will abide the result."

The defendants thereupon applied for and obtained special leave to appeal to His Majesty in Council.

B. Dube, for the Appellants: S. 1. of Sch. II of the Code of Civil Procedure, 1908, requires that all parties should agree that the matter in dispute should be referred to arbitration, but there is no provision that all parties should sign the application, which must be in writing. Even if the omission to sign the application by the guardian were an error in law, the award could not be set aside for such an error. The Court rejected the objections raised under section 15 of the said schedule and passed judgment according to the award under section 16 thereof, and there is neither appeal nor

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revision from that judgment : *Ghulam Jilani v. Muhammad Hussan* (1). The Officiating Chief Commissioner had no power to grant a review of the order rejecting the application for revision : See O. 47, r. 1. of the said Code.

The Respondents did not appear.

The judgment of their Lordships was delivered by

Viscount Haldane :—In this appeal the question is whether the Officiating Chief Commissioner of Ajmer-Merwara has properly set aside the award in certain arbitration proceedings. The respondents had brought a suit to recover from the appellants Rs. 88,320 alleged to be due under a mortgage. The appellant first on the record is the father of the second appellant, who was at the time of the proceedings a minor. The trial Judge appointed one Bhur Singh guardian-*ad-litem* of this minor appellant. Before the trial came on all the parties entered into an agreement to refer the questions in dispute to two arbitrators and, in the event of these differing, to an umpire. The agreement was signed by the appellants and respondents each with his own hand, excepting in the case of the minor appellant, on whose behalf it was signed by the guardian-*ad-litem*. The parties appeared before the trial Judge and produced the agreement and applied for an order of reference. The guardian-*ad-litem* was present in Court and was a party to the application. The trial Judge thereupon made an order of reference. The arbitrators differed, and the parties then concurred in an application to refer the dispute to the umpire, and an order was made accordingly. The umpire made an award allowing the respondents' claim to the extent of Rs. 17,510 only. This award was filed in Court. The respondents, being dissatisfied with it, applied to the trial Judge under the provisions of S. 15 of the second schedule of the Code of Civil Procedure 1908 to set the award aside. The trial Judge refused the application. He held that all the parties to the suit, including the guardian-*ad-litem*, had been consenting parties to the application, and further that there was no ground for the objections made on the merits to the award. The order was made under S. 16 of the second schedule to the Code already referred to. This section provides that—“(1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judg-

(1) (1901) L. R. 29 I. A. 51 ; I. L. R. 29 Calc. 167.

ment according to the award. (2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree, except in so far as the decree is in excess of, or not in accordance with, the award."

The respondents then presented an application to the Chief Commissioner under section 115 of the Code of Civil Procedure. This section provides that :—"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court, and in which no appeal lies thereto, and if such subordinate Court appears (a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order as it thinks fit."

The Chief Commissioner dismissed the application. He held that the point taken that the application to the Court for reference to arbitration was not signed by the guardian-*ad-litem*, was not a good one, having regard to the fact that the agreement itself was signed by all parties concerned. Moreover, he thought that it was for the minor or his guardian, and not for the applicants, to raise such an objection. He also held that even if an agreement or compromise entered into on behalf of a minor without the leave of the Court was voidable against all parties other than the minor, that did not make it necessarily void against the minor. As to the merits he was of opinion that there was nothing in the case made for the applicants, the present respondents, based on misconduct or irregularity on the part of the arbitrators and umpire.

The respondents then applied to the Court of the Chief Commissioner for a review of this order, relying on S. 114 of the Code which, subject to such conditions and limitations as may be prescribed, allows a person aggrieved to apply for a review of any decree or order from which no appeal is allowed by the Code, and relying also on order 47 (1) of the First Schedule to this Code which provides that he may apply for such review on :—"the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason."

These rules are, under S. 121 of the Code, to have effect as if enacted in it, until altered as the Code provides.

This application for review was heard, not by Sir Elliot Colvin,

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the Chief Commissioner, but by Mr. Stratton, who was officiating in his absence. The appellants were not represented on this hearing. The main point urged was that in dismissing the application for review the High Court was in error in regarding the omission to sign the application for arbitration by the minor or his guardian as unimportant, and as covered by the agreement which all the parties had signed. The Officiating Chief Commissioner acceded to the application, and set aside the whole of the arbitration proceedings, on the ground, apparently, that this error in the proceedings, though technical only, was fatal. The only other arguments before him appear to have been that even if the umpire had proper jurisdiction his action was illegal, because he opened the case *de novo*, whereas all he had to do was to consider the points on which the arbitrators had failed to agree, and because he had not taken evidence, although he called for it.

Their Lordships have had to hear the appeal *ex parte*, as the respondents, the plaintiffs in the suit, did not appear on the appeal, but they have examined closely the documents and the various judgments in the Courts below. They are of opinion that the decisions of the trial Judge and of the Chief Commissioner were right, and ought not to have been interfered with by the Acting Chief Commissioner.

In the first place the second schedule to the Code of Civil Procedure, which provides by S. 1 that where the parties to a suit have agreed that the matter in difference shall be referred to arbitration they may apply in writing to the Court for an order of reference, does not require that the writing should of necessity be signed. As the guardian in this case was in Court and assented to the application it is plain that no injustice has arisen. They think, therefore, that there is no substance in the technical objection relied on. Nor can they find any defect on the face of the award, or any misconduct of the arbitrators or umpire, or concealment of facts by any of the parties which would bring the case within those provisions in the second schedule which might enable the Court to set it aside. They have accordingly arrived at the conclusion that the Acting Chief Commissioner was not justified in interfering with the order refusing revision made by the Chief Commissioner.

They are, therefore, of opinion that the appeal must be allowed with costs here and in the Courts below, and they will humbly advise His Majesty to that effect.

Barrow Rogers & Nevil.—Solicitors for the Appellants.

The Respondents did not appear.

J. M. P.

Appeal allowed.

PRESENT :—*Viscount Haldane, Lord Wrenbury, Sir John Edge, and Mr. Ameer Ali.*

A. K. A. S. JAMAL

v.

MOOLLA DAWOOD, SONS, & COMPANY.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Contract—Sale of shares—Breach—Non-payment—Measure of damages—Provision that on breach by the buyer the seller had the option to resell by auction, effect of—Notice of intention to exercise the option—Indian Contract Act (IX of 1872), section 107.

The measure of damages for breach of a contract for sale of negotiable securities, for instance shares, is the difference between the contract price and the market price at the date of the breach, with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach. The seller is not bound to reduce the damages, if he can, by a subsequent sale at better prices. If the seller holds on to the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

The fact that by reason of the loss of the contract which the contractee failed to perform, the contractor obtained the benefit of another contract which was of value to him, does not entitle the contractee to the benefit of the latter contract.

A contract for sale of shares to be delivered on a certain date contained a term providing that in the event of the buyer not making payment on the date of delivery the seller should have the option of reselling the shares by auction, and any loss arising should be recoverable from the buyer. On failure of the purchaser to take delivery, the buyer gave notice of his intention to sell the shares by auction, but did not carry out his intention :

Held, that upon breach by the purchaser his contractual right to the shares fell to the ground, and there arose a right in the seller to damages ; that the stipulation in question meant that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified ; and that if the seller availed himself of that option he was not selling the purchaser's shares with a consequential obligation to account to him for the price but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price.

Held, also, that the said notice by the buyer did not amount to an election to take a measure of damages to be arrived at by a resale, and that section 107 of the Indian Contract Act had no application.

Staniforth v. Lyall (1) ; *Yates v. Whyte* (2) ; *Bradburn v. Great Western Railway* (3) ; *Jebson v. East and West Indies Dock* (4) ; *Rodoanachi v. Milburn* (5) ; and *Williams v. Agins* (6), referred to.

(1) (1830) 7 Bing, 169.

(3) (1874) L. R. 10 Ex. 1.

(5) (1886) L. R. 18 Q. B. D. 67.

(2) (1838) 4 Bing. N. C. 272.

(4) 1875) L. R. 10 C. P. 300.

(6) (1914) L. R. (1914) A. C. 510,

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Dawood.*A. K. A. S. Jamal v. Moolle Dawood, Sons, & Company* (7) reversed.

Appeal from a judgment and decree dated the 24th July, 1913, of the Chief Court of Lower Burma on its Appellate Side affirming a judgment and preliminary decree and a final decree of the same Court on its Original Side, dated respectively December 18, 1912, and January 24, 1913.

The appellant sued the respondents for Rs. 1,09,218-12-0 as damages for breach of six contracts made at various dates between April and August 1911, for sale of 23,500 shares, the delivery for which was to take place on the 30th December, 1911. The appellant tendered the shares on that date but the respondent failed to take delivery. The shares had fallen in value on the date fixed for delivery. The appellant contended that the measure of damages was the difference between the contract prices of the shares (i. e. Rs. 1,84,125-10-0) and their market prices (viz., 4-3 per share) on the date of the delivery when the breach took place. It appeared that the appellant had sold the shares in various lots after the breach, and realized prices which were higher than the market prices on December 30, 1911, except in two instances. The respondents contend that under the terms of the contract if they failed to make payment for the shares on the settlement day, the appellant had an option to resell the shares, that he had given notice of his intention to resell them, and that he had in fact, sold the shares at prices which were higher than the market prices on December 30, 1911, and consequently he was entitled only to the difference between the contract prices and the prices at which the shares were actually sold. Ormond J., who tried the case upheld the respondents' contention for the following reasons :—

"Now we come to the question of damages. The plaintiff sues for the difference between the market rate on the due date (4s. 3d.) and the contract rate. Defendant contends that the plaintiff having in his letters expressed an intention of reselling he (the defendant) is entitled to the benefit of the higher rate at which the plaintiff actually sold. The plaintiff in his letter of the 30th December, Exhibit A, says "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo," and in his letter, Exhibit D, of the 2nd January, he says, "We have now to give you notice that our client intends to resell these shares and to institute a suit against you for the recovery of any loss which may result from that course. Unless the price is paid in cash within 7 days from this date our client will

proceed to carry out this intention without further reference to yourself," and on the 4th of January, Exhibit F, he says "Our client will pursue the course indicated in the correspondence." On the 26th February (Exhibit 1) his lawyers write "It now seems that no active steps are being taken to settle the matter but that much time is being lost. Our client will therefore now proceed to enforce his rights by suit unless the sum of Rs. 1,09,219-6 is paid to him by way of compensation before the end of the week. The amount claimed is arrived at by deducting Rs. 74,906-4 the value of 23,500 shares at 4s. 3d. from Rs. 1,84,125-10 the agreed price of the shares." Plaintiff's counsel informed me that the market rate on the 26th February was 4s. 3d., *i. e.*, the same as on the due date. One of the "rules" on the back of the contract notes states that in default of payment for the shares on the date of the settlement or by noon on the day following, the seller shall have the option of reselling the shares by auction at the Exchange at the next meeting, any loss caused thereby shall be recoverable from the buyer.

The plaintiff had no other right of resale beyond that. At the time that he first gave notice of his intention to resell he still had the right, but he subsequently failed to exercise it, *i. e.*, though he has sold these shares at a higher rate than the rate of the due date, he did not purport to resell them as against the defendant. Can then the defendant firm claim to have the benefit of the higher prices realized by the plaintiff? I think they can. If a seller, having the right of resale, elects to exercise such right he must give notice of his intention to resell; and having done so he has made his election between the two measures of damages that were open to him. After giving such notice, it is his duty to resell either at the time (if any) appointed by the contract or within a reasonable time after the date of the breach.

If he delays, he takes upon himself all risk arising from further depreciation. And if he sells at a higher rate, such sale will be taken to be a resale in pursuance of his notice: for otherwise he would be allowed to benefit by his own wrong.

The plaintiff will, therefore, have a decree with costs for an amount equal to the difference between the total amount, *viz.*, Rs. 1,84,125-10 agreed to be paid for these 23,500 shares under the six contracts, and the amount realised by plaintiff upon all sales of these shares, up to 23,500 shares made by him subsequently to the 26th February 1912.

On inquiring it was found that the appellant had realized

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Rs. 1,04,261-10-9. The learned Judge therefore gave the appellant a decree for Rs. 79,862-15-3.

The appellant then appealed, but his appeal was dismissed by Hartnell, O. C. J., and Young, J. who held that the true measure of damages was the difference between the contract prices and the market prices on the date of the breach, that the appellant was bound to carry out the intention he had at first expressed to resell ; and that apart from any question of election the respondents were equitably entitled to the benefit of the higher prices realized by the appellant in mitigation of the damages payable by them. For a full report of the judgment see 7 Lower Burma Rulings, p. 252.

The appellant thereupon appealed to His Majesty in Council.

Sir H. Erle Richards, K. C., and Coltman, for the Appellant : The true measure of damages is the difference between the contract price and the market price on the day of the breach December 30, 1911, and the Court below were not right in holding that the appellant should give credit for the profit made by him by sale of the shares mostly after the suit : *Pott v. Flather*.⁽¹⁾ The appellant was not bound to sell the shares as he intimated in his letters and S. 107 of the Indian Contract Act does not apply.

[Viscount Haldane referred to *British Westinghouse Electric and Manufacturing Company Ltd. v. Underground Electric Railways Company of London, Ltd.*⁽²⁾]

The principle as to measure of damages there stated was considered in the case of *William Brothers v. Ed. T. Agius, Ltd.*⁽³⁾ and that principle is that a subsequent transaction, if it is to be taken into account in mitigation of damages must be one which arises out of transactions naturally attributable to the consequences of the breach, and must not be of an independent character. Here the subsequent sales were of an independent character, because the appellant was under no obligation whatever to sell the shares. S. 73 of the Indian Contract Act, illustrations (a) and (c), was also relied on.

Frank Dodd, for the Respondents : The negotiations between the parties suspended the right of the plaintiff to sell the shares pending the negotiations. The plaintiff said to the defendants that he was treating the shares as theirs. The negotiations ended on the 26th February 1912, and the first sale took place two days

(1) (1847) 16 L. J. Q. B. 366. (2) (1912) L. R. (1912) A. C. 673, (689).

(3) (1914) L. R. (1914) A. C. 510, (520).

thereafter. The defendants are therefore entitled to an account as held by the Courts below.

No reply was called upon.

The judgment of their Lordships was delivered by

Lord Wrenbury.—Under six contracts made at various dates between April and August 1911 the plaintiff (the appellant) was seller to the defendants of certain 23,500 shares at prices amounting in the aggregate to Rs. 184,125-10. The date for delivery was the 30th December 1911. The contract notes contained a term providing that in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction, and any loss arising should be recoverable from the buyer. In some cases the words ran: "by auction at the Exchange at the next meeting," &c.

By the 30th December the shares had fallen largely in value. On that day the vendor tendered the shares and asked payment of the price, adding: "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo, responsible for all losses sustained thereby." The purchasers did not pay the sum demanded. They set up a contention that the seller was indebted to them on another transaction, and they sent cheques for the differential sum of Rs. 75,925-10, and called for a transfer of the shares. On the 2nd January 1912 the seller repudiated the claim to a set-off and repeated: "We have now to give you notice that our client intends to resell these shares and to institute a suit against you for the recovery of any loss which may result from that course." The purchasers stopped payment of the cheques, and nothing turns upon the fact that they were given.

Negotiations ensued between the parties which extended to 26th February 1912. On that day the seller, by his agents, wrote to the purchasers a letter as follows:—

"71, Phayre Street, Rangoon,
26th February, 1912."

"Messrs. Moolla Dawood and Sons."

"Dear Sirs,

"We are instructed by Mr. A. K. A. S. Jamal that he has not hitherto taken any steps to enforce his claim against you for failing to pay for and take delivery of 23,500 shares in the British Burma Petroleum Company, Limited, at your request, in order that his claim might, if possible, be settled. It now appears that no active

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steps are being taken to settle the matter but that much time is being lost. Our client will therefore now proceed to enforce his rights by suit unless the sum of Rs. 1,09,219-6 is paid to him by way of compensation before the end of this week.

"The amount claimed is arrived at by deducting Rs. 74,906-4, the value of 23,500 shares at 4s. 3d., from Rs. 1,84,125-10, the agreed price of the shares."

"Yours faithfully,

GILES AND COLTMAN."

The 4s. 3d. a share there mentioned was the market price of the shares on the 30th December.

On the 22nd March the seller commenced a suit to recover Rs. 1,09,218-12 as damages for breach measured by the difference between the contract price of the shares and their market price (4s. 3d. a share) on the date of the breach, the 30th December 1911. This is (with a trifling variance) the same sum and arrived at in the same way as the Rs. 1,09,219-6 mentioned in the letter.

Immediately after the letter of the 26th February 1912, viz., on the 28th February, the seller commenced to make sale of the shares. He sold them all at various dates from the 28th February onwards. In one case the sale was at less than 4s. 3d. (viz., at 4s.). In one case it was at 4s. 3d. In every other case it was at a higher price.

The decision under appeal is one which gives the purchaser the benefit of the increased prices which the shares realised, by giving him credit in reduction of the damages for the increased prices in fact realised over the market price at the 30th December, the date of the breach. The appellant contends that this is wrong.

Their Lordships will first deal with the contractual term as to resale. Upon breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages, and the stipulation in question was in their Lordships' opinion only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. If the seller availed himself of that option he was not selling the purchaser's shares with a consequential obligation to account to him for the price but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price. Their Lordships are unable to agree with the original Judge that the plaintiff's letters of the 30th December and

2nd January amounted to an election to take a measure of damages to be arrived at by a resale. Moreover, there never was any sale by auction under the option. Nothing turns upon this provision as to resale.

The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach—with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller holds on to the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach*. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Staniforth v. Lyall*(1) is an illustration of this. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him, does not entitle the defendant to the benefit of the latter contract: *Yates v. Whyte*(2), *Bradburn v. Great Western Railway*(3), *Jebson v. East and West India Dock*(4).

The decision in *Rodocanachi v. Milburn*(5), that market value at the date of the breach is the decisive element, was upheld in the House of Lords in *Williams v. Agius*(6). The breach in *Rodocanachi v. Milburn*(5), was breach by the seller to deliver, but

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(1) (1830) 7 Bing. 169.

(2) (1838) 4 Bing. N. C. 272.

(3) (1874) L. R. 10 Ex. 1.

(4) (1875) L. R. 10 C. P. 300.

(5) (1886) L. R. 18 Q. B. D. 67.

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in their Lordships' opinion the proposition is equally true where the breach is committed by the buyer.

The respondents further contend that sections 73 and 107 of the Indian Contract Act, or one of them, is in their favour. As regards section 107 their Lordships are unable to see that it has any application in the present case. It deals with cases in which a seller has a lien on goods or has stopped them in *transitu*. The section follows upon sections dealing with those subject matters. The present case is not one which falls under either of those heads. The seller was and remained the legal holder of the shares.

As regards section 73 it is but declaratory of the right to damages which has been discussed in the course of this judgment.

Their Lordships find that upon the appeal the Officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss at the date of the breach. The seller's loss at the date of the breach was and remained the difference between contract price and market price at that date. When the buyer committed this breach the seller remained entitled to the shares, and became entitled to damages such as the law allows. The first of these two properties, viz., the shares, he kept for a time and subsequently sold them in a rising market. His pocket received benefit, but his loss at the date of the breach remained unaffected.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the orders in the original Court and in the appeal Court discharged, and judgment entered for the plaintiff according to his plaint, and that the respondent ought to pay the costs in the Courts below and of this appeal.

Arnould and Sons :—Solicitors for the Appellants.

Bramall and Whites :—Solicitors for the Respondents.

J. M. P.

Appeal allowed.

CIVIL RULE.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Newbould.*

GANGAHARI CHAKRABARTI

v.

NABIN CHANDRA BANIKYA AND ANOTHER.*

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*Limitation Act (IX of 1908), Sch. I, Arts 145, 49, 115—Suit against depository
—Gold entrusted to make ornament—No delivery of ornament.*

Article 145, Schedule I of the Limitation Act is applicable to a claim for reconveyance of a certain quantity of gold, which was made over by the plaintiff to the defendant for a specific purpose not carried out.

The article applies even when the property is not recoverable in specie. It does not cease to be applicable merely because the defendant, after demand, wrongfully refuses to return the property; such refusal does not bring into operation articles 48 and 49.

Kristo Kamini v. Administrator-General (1); Administrator-General v. Kristo Kamini (2); Narmadabai v. Bhavani Shankar (3); and Gangineni v. Gottipati (4) referred to.

Even if articles 49 and 115, schedule I of the Limitation Act were applicable, the suit was not barred, as the cause of action arose within three years from the date of the institution of the suit.

Application for revision by the Plaintiff.

Application under section 25 of the Provincial Small Cause Courts Act.

The material facts and arguments appear from the judgment.

Babu Gopal Chandra Das for the Petitioner.

Moulvi A. K. Fazlul Huq and *Babu Jatindra Mohan Chowdhry* for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee J.—The question for decision in this Rule is, whether the suit is barred by limitation. The case for the plaintiff is that about eleven years ago he made over to the defendants, goldsmiths by profession, gold ornaments of the weight of one *tola* in order that they might be melted and new ornaments made therewith;

April 30.

* Civil Rule No. 1154 of 1914, against the decision of Babu D. N. Sen Gupta, Munsiff of Bujitpur, exercising the powers of a Small Cause Court Judge, dated the 7th September, 1914.

(1) (1903) 7 C. W. N. 476.

(2) (1904) I. L. R. 31 Calc. 519; 6 C. L. J. 535.

(3) (1902) I. L. R. 26 Bom. 430.

(4) (1909) I. L. R. 33 Mad. 56.

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no time was fixed within which the work was to be finished. The plaintiff asserts that the defendants put him off from time to time and that ultimately when on the 24th March 1914, he pressed the defendants for the ornaments, they promised to make and deliver them within fifteen days. This period, however, expired, and yet the plaintiff has not been able to get these ornaments. He consequently instituted this suit on the 11th May 1914, and prayed, in the alternative, either that the defendants be directed to return the one *tola* of gold to him or that a decree for the price thereof, namely Rs. 25, might be made against them. The Small Cause Court Judge has dismissed the suit on the ground that it is barred by limitation. In our opinion, this view cannot possibly be supported.

The case is governed either by Art. 49, or 115 or 145 of the Indian Limitation Act. Art. 145 provides that a suit against a depository to recover movable property deposited must be instituted within 30 years from the date of deposit. This article, as was observed in *Kristo Kamini v. Administrator-General* (1), and *Administrator-General v. Kristo Kamini* (2), applies even when the property is not recoverable in specie. The Article does not also cease to be applicable merely because the defendant, after demand, wrongfully refuses to return the property; such refusal does not bring into operation articles 48 and 49: *Narmadabai v. Bhavani Shankar* (3); *Gangineni v. Gottipati* (4). Consequently, article 145 may be applied in so far as the first prayer in the plaint is concerned, namely, recovery of one *tola* of gold which, if his case is true, was made over by the plaintiff to the defendants for a specific purpose, not yet carried out.

But even if article 145 is not applied, no question of limitation arises either under Art. 49 or Art. 115. Art. 49 provides that a suit for compensation for wrongfully detaining specified movable property may be instituted within three years from the date when the detainer's possession becomes unlawful. In this case, the detainer's possession did not become unlawful till he had wrongfully refused to apply the gold to make ornaments as he had originally agreed to do. According to the plaintiff there was no refusal till the 8th April 1914. Consequently the suit is within time. The same result follows, if Art. 115 is applied. Under that article, a suit for compensation for the breach of any contract, express or implied,

(1) (1903) 7 C. W. N. 476.

(2) (1904) I. L. R. 31 Calc. 519; 6 C. L. J. 535.

(3) (1902) I. L. R. 26 Bom. 430.

(4) (1909) I. L. R. 33 Mad. 56.

not in writing registered and not specially provided for, may be instituted within three years from the date when the contract is broken. In this case, the contract was not broken till the 8th April 1914; indeed, it is not the case for the defence that there was a demand by the plaintiff on an earlier occasion and a refusal on their part. In our opinion the view taken by the Small Cause Court Judge is erroneous and his decree cannot be supported.

The result is that this Rule is made absolute, the judgment and decree of the Court below set aside, and the case remanded for trial on the merits. The petitioner is entitled to the costs of this Rule. We assess the hearing fee at one gold mohur.

A. T. M.

Rule made absolute : Case sent back.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Richardson.*

YUSUF AKRAM

v.

ARFAN ALI KHAN.

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July, 30.

Provincial Small Cause Courts Act (IX of 1887), Sec. 17, Sub-Sec. (1)—Dismissal for default—Decree passed ex parte.

An applicant for an order to set aside an order of dismissal for default is not an applicant for an order to set aside a decree *ex parte*.

Jamina Bibi v. Seri Chand (1) followed.

Application for revision by the Plaintiff.

Application under section 25 of the Provincial Small Cause Courts Act.

The material facts and arguments appear from the judgment.

Babu Hem Chunder Mojumdar for the Petitioner.

No one appeared for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee, J.—We are invited in this Rule to set aside an order of the Small Cause Court Judge dismissing an application

July, 30.

* Civil Rules Nos. 120 and 121 of 1915, against the decision of Babu A. C. Banerjee, Munsiff of Bhanga, dated the 14th November, 1914.

(1) (1898) 2 C. W. N. 693.

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for revival of a suit which had been dismissed for default. The Small Cause Court Judge held that the plaintiff had failed to deposit as required by law, the amount of costs due from him to the defendant under the decree or to furnish security to the satisfaction of the Court. In our opinion, this view is clearly erroneous. The proviso to sub-sec. (1) of sec. 17 of the Provincial Small Cause Courts Act lays down that an applicant for an order to set aside a decree passed *ex parte* shall make the requisite deposit or give security. But an applicant for an order to set aside an order of dismissal for default is plainly not an applicant for an order to set aside a decree passed *ex parte*. This view is in accord with the decision of this Court in the case of *Jamina Bibi v. Seri Chand Bhagat* (1). The matter has now been placed beyond controversy by clause (2) of section 2 of the Code of 1908 which lays down that an order of dismissal for default is not a decree.

The result is that this Rule is made absolute, the order of the Small Cause Court Judge set aside and the case returned to him in order that the application for revival of the suit may be heard on the merits. As the Rule is not opposed we make no order for costs.

This judgment will govern Rule 121 of 1915 in which a similar order will be drawn up.

A. T. M.

Rules made absolute : Cases remanded.

(1) (1898) 2 C. W. N. 693.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.

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May, 20.

GOVINDA CHANDRA BASAK

v.

HARIDAS BASAK.*

Interest—Partner contributing excess sum towards capital.

Subject to any agreement between the parties, interest is payable on money paid or advanced by one partner for partnership purposes beyond the amount of capital to which he had agreed to subscribe, as the advance is not an increase of its capital but rather as a loan.

* Appeal from Appellate Decree No. 1765 of 1913, against the decision of G. B. Mumford Esq., District Judge of Dacca, dated the 18th March, 1913, confirming that of Babu Kamala Nath Das, Subordinate Judge of Dacca, dated the 21st September, 1912.

Appeal by the Defendant.

Suit for dissolution of partnership and adjustment of accounts.

The material facts and arguments appear from the judgment.

Babus Joges Chunder Roy and *Bepin Chunder Bose* for the Appellant.

Babu Probodh Chunder Roy for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the defendant in a suit for dissolution of partnership and adjustment of accounts. The plaintiff and the defendant were partners. Their original idea was that capital should be contributed equally by both of them ; but in the events, which have happened, the defendant, it is said, has contributed a much larger sum than the plaintiff has done. The defendant prays that in the settlement of accounts he may be allowed interest on the excess sum contributed by him towards the capital. The Courts below have disallowed this claim. In our opinion the view taken by the District Judge cannot be supported.

On behalf of the respondent, it has been urged that, as a general rule, interest between partners is not allowed, unless there is an express stipulation, or a particular course of dealing between the parties as shown by the partnership books, or a trade custom to the contrary. This may be accepted as a correct statement of the general rule, and is recognised in a long line of authorities : *Rushton v. Grissel* (1) ; *Hill v. King* (2) ; *Rhodes v. Rhodes* (3) ; *Stevens v. Cook* (4) ; *Cooke v. Benbow* (5) ; *Boddam v. Ryley* (6) ; *Pein v. Harris* (7). But upon this rule, there has been engrafted an important qualification, namely, that an advance by a partner to the firm is treated not as an increase of its capital but rather as a loan on which interest should be paid ; and that, subject to any agreement between the parties, interest is payable on money paid or advanced by one partner for partnership purposes beyond the amount of capital which he had agreed to subscribe. This principle is obviously consistent with the rules of justice equity and good conscience which we are bound to administer. In

(1) (1868) L. R. 5 Eq. 326.

(2) (1863) 3 DeG. J. & Sm. 418.

(3) (1860) 6 Jur. (N.S.) 600.

(4) (1859) 5 Jur. (N.S.) 1415 ; 115 R. R. 1066.

(5) (1865) 3 DeG. J. & Sm. 1.

(6) (1783) 1 Brown C. C. 239 ; (1785) 2 Brown C. C. 8 ; (1787) 4 Brown C. C. 561.

(7) (1876) L. R. 10 Eq. 442.

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Miller v. Craig (1) Lord Langdale, M. R. observed: "Can one believe that a party to whom the whole capital belonged, renounced his advantage in that respect, and, continuing to take an equally laborious part in the transaction of the business, should bring in his whole income both partnership and private, and yet intend to reserve no advantage of that income upon the settlement of accounts between himself and co-partner? I must say, I have great difficulty in coming to such a conclusion as that." A similar view was expressed by Knight Bruce L. J. in *Ex parte Chippendale* (2): "But there remains the question of interest. As to this I have doubted. Without, however, relying merely on Lord Hardwicke's authority, as, for instance, on *Omychand v. Barker* (3) and *Barwell v. Parker* (4), I think that mercantile usage and the general course of trade dealings do, where a partner in a trade has duly and properly advanced money of his own for the purposes of the partnership business, so as to become justly a creditor in account with the partnership for the amount, raise an implied contract for interest, so as to entitle the partner advancing to have his account with the firm credited with interest accordingly, although his partners may not have authorised and may not have known of the transaction, at least in the absence of any express contract to the contrary." To the same effect are the observations of Turner L. J. that the view can be defended on grounds of equity. In our opinion, it is fairly clear that in the present case the plaintiff respondent who claims the benefit of the profits which have accrued from the sums advanced to the partnership business by the defendant, is bound in justice to make an allowance for interest on those sums to his partner.

The result is that this appeal is allowed in part and the preliminary decree made by the District Judge modified. We direct that on all sums advanced by the defendant towards the partnership concern in excess of his share of the capital, interest be allowed in his favour at the rate of six per. cent. per annum. Each party will pay his own costs throughout the litigation.

A. T. M.

Appeal allowed in part.

(1) (1843) 6 Beav. 433.

(2) (1853) 4 DeG. M. & G. 19 (36).

(3) (1744) 1 Atk. 21.

(4) (1751) 2 Ves. Sen. 364.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.

BAIKUNTHA NATH RAI CHAUDHURI AND OTHERS

v.

BASANTA KUMARI DAS AND OTHERS.*

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—
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*May, 4, 5,
August, 26.*

Ejectment, suit for—Revenue sale—Adverse possession—Plaintiff to succeed on his own title—Defendant not able to establish title to all lands in his possession.

There were two contiguous estates A and B, held by X and Y respectively. X annexed a portion of B and professed to hold it as included in A, till the title of B was extinguished. X made default in the payment of Government revenue and his estate A was sold :

Held, that the Collector only sold the estate A as it stood at the time of the permanent settlement and did not put up to sale the portion of B annexed to A by X.

The effect of the adverse possession by X with regard to the lands of B was to make him a joint proprietor of B along with Y.

The plaintiff in an action in ejectment must succeed on the strength of his own title; he cannot succeed, merely because the defendant may not be able to establish title to all the lands in his possession.

Appeal by the Plaintiffs.

Suit for recovery of possession upon declaration of title.

The material facts and arguments appear from the judgment.

Babus Jages Chunder Roy and Surendra Nath Das Gupta for the Appellants.

Babus Nilmadhab Bose, Surendra Chandra Sen, Sib Chandra Palit, Gunada Churan Sen, Rujendra Chandra Guha, Sarat Chandra Sen and Hemendra Chandra Sen for the Respondents.

C. A. V.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the plaintiffs in a suit for recovery of possession upon declaration of title instituted so far back as the 27th February, 1899. There were more than 100 defendants in the suit, with the result that frequent deaths amongst the parties litigants have delayed the trial of the suit both here and in the Court below. The trial Court was not able to dispose of the suit till the 5th September, 1904, and although the appeal was lodged in this Court on the 13th February, 1905, it could not be finally heard till more than ten years later.

The plaintiffs claim the disputed lands as included in kismat Boaldia which they allege is comprised in estate No. 3846 pur-

* Appeal from Original Decree No. 68 of 1905, against the decree of Babu Bhuban Mohan Ganguli, Subordinate Judge of Barisal, dated the 5th September, 1904.

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chased by them at a sale held for arrears of revenue on the 25th March, 1897. This estate constitutes a $12\frac{1}{2}$ gandas share of Pergana Selimabad. Three of the defendants Nos. 58, 59 and 60 are the recorded proprietors of estate 3847, another, No. 61 is the proprietor of estate 3848, and three others, Nos. 62, 63 and 64, are the proprietors of estate 3849. These three latter estates constitute a $9\frac{1}{4}$ ganda each of Pargana Selimabad, so that the four estates taken together constitute a 2 annas share of Selimabad. The case for the plaintiffs is that the lands in dispute are comprised exclusively in estate 3846 and that the defendants are unlawfully in possession thereof under the colour of tenures and under-tenures which are either fictitious, or, if real, do not bind the plaintiffs as purchasers at a sale for arrears of revenue. The Court below has found that these under-tenures do not bind the property in the hands of the plaintiffs and as the first defendant who is affected by this adverse finding has not taken exception to it, either by an independent appeal or by way of cross-objections, the question does not directly arise for consideration in this appeal. The Subordinate Judge has further held that as the plaintiffs have failed to prove that the disputed lands are comprised exclusively in estate 3846, they must be deemed to be the joint-lands of the entire original estate Selimabad, out of which the different estates claimed by the parties as also other estates have been carved out. In this view, the plaintiffs would be entitled to a decree for possession of a $12\frac{1}{2}$ ganda share of the disputed lands; but the Subordinate Judge has given the plaintiffs a decree for $16\frac{1}{4}$ ganda share, because the Thak Map shows that estate 3846 comprises such share of the lands in question. The plaintiffs are dissatisfied with this decree and have appealed to this Court. On their behalf three alternative aspects of the case have been put forward, namely, *first*, that the first defendant had acquired a good title to all the disputed lands by adverse possession as against all the other defendants and that as the first defendant had no substantial defence against the plaintiffs, the latter were entitled to a decree for all the lands claimed; *secondly*, that as the two contesting defendants 58 and 59, the purchasers of estates 3842 and 3847, had title to 1 anna $7\frac{1}{2}$ gandas (or 1 anna $11\frac{1}{4}$ gandas according to the Thak Map) the plaintiffs were entitled to a decree for the remaining share; and *thirdly*, that the lands are the joint lands of the two-annas share of the original zemindary Selimabad and that the plaintiffs are entitled to a decree on that basis.

Before we deal with these questions, we may advert to two preliminary points. It is clear, in the first place, that Pargana

Selimabad was partitioned before the Permanent Settlement. This is conclusively shown from a letter addressed by Mr. G. Thompson, Collector of Dacca on the 28th December 1793 to the President and Members of the Board of Revenue. This letter was not produced before the Subordinate Judge; in fact its existence was traced out from a passage in the history of Backerganj by Mr. Beveridge. The letter has been produced in this Court and has been admitted in evidence by consent of all the parties. As the letter contains the early revenue history of Pargana Selimabad, which is essential for the proper appreciation of the evidence in this case, we set it out below, though it is expressed in quaint phraseology:—

To

W. COWPER, Esq.,

President and Members of the Board of Revenue.

GENTLEMEN,

I now beg leave to address Your Board on the subject of Perganah Salimabad and to lay such information before you regarding it as will, I trust, enable you to furnish me with your final instructions on the mode to be adopted for concluding the settlement of it.

On a view of my predecessor's correspondence with your Board respecting this mehal I find in his letter of the 8th October 1791, he states as the cause of the decline of the public Revenue in it, that it is the joint property of the several numerous shares without any separation or division of the land composing it, consequently that every petty talookdar or ryot is subject to be harassed by being under the control and subject to the vexatious demands of 18 rapacious masters; and for the removal of this grievous evil, he proposes that a general division of the Perganah shall be made, observing further that another essential benefit would result from the adoption of this plan in the ascertainment of the actual quantity of land possessed by the Salt Byparee Talukdars, many of which he states he has every reason to believe, from the information given him, hold their land at a very low rate, owing to the dishonesty of the mofussil servants, and Your Board relying on the information submitted by him respecting the state of the property in the Perganah approve his proposal, and at your recommendation the Governor-General-in-Council was pleased to direct under date the 20th June 1792 that the whole of the mehal should be held khas for the purpose of making a general division of it between the several proprietors, so that each should have his share of the land composing it allotted to him.

After such information furnished by the late Collector when he

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had been in the office nearly three years and in this period it was to be presumed he had accurately informed himself of the state of the property in the mehal, it will no doubt be with some surprise, the Board are now informed that the division recommended was totally unnecessary, the Perganah having undergone a complete division and each share being separate and distinct from the other with the exception of the Jabberaumul and which being disputed property between the proprietors of the $11\frac{1}{2}$ anna and some of those holding the property of the $4\frac{1}{2}$ anna division must necessarily undergo a judicial enquiry for the adjustment prior to any division of it being made.

In order to show your Board that the Perganah has undergone the complete division stated by me, I shall beg leave to state the periods when the various divisions were made and the causes which give rise to them. The whole property in the Perganahs having been usurped by Aga Baker during the period he held the Waddah-dharee of it, the dispossessed proprietors in the year 1156 B.S., preferred a complaint to the Soubah of Bengal, who restored them to the possession of a $4\frac{1}{2}$ anna proportion of it, and in that year the division of it both of land and jumma was made by Uzmutoollah Ammeen appointed by the Soubah for the purpose, and sometime afterwards the $4\frac{1}{2}$ anna Division underwent a sub-division into ten shares between the respective Proprietors of it and now stand as follows :—

			g.	c.
Shibnarain Roy ...	...	...	12	1
Odaieanarain Roy ...	...	...	9	1
Doolabnarain Roy...	...	...	9	1
Luckenarain Roy ...	...	...	9	1
Joychand Roy ...	...	...	17	2
Raj Chandra Roy ...	...	...	5	0
Kishenram Roy ...	...	...	10	1
Ram Ram Roy ...	...	...	7	0
Pertabnarain Roy ...	...	...	6	1
Kissen Ram Roy ...	...	...	4	0

From the period of the above divisions the $11\frac{1}{2}$ and $4\frac{1}{2}$ annas shares as well as the sub-division of the latter have been separate and distinct and have had no connection with each other. Aga Backer remained in possession of his $11\frac{1}{2}$ annas proportion until the year 1160 when he suffered the punishment of death for the crime of rebellion and Raja Ranje-Ballav was appointed to attach the whole of his property and effects which became forfeited to the

state, the latter were disposed of by the reigning Government but the land, the family of Rajbollav had sufficient influence with the Court to retain in their possession until the end of the Bengal year 1164 when in the Government of Mr. Nerulst (Illegible) Sheevnarain, the son of Joynarain, one of the original proprietors assisted with the influence and patronage of Gocool Ghosaul obtained restoration of the share of which the family had been unjustly deprived by the usurpation of Aga Backer, and for the assistance afforded by Gocool Ghosaul he was presented with a moiety of the recovered property or a 5 annas 15 ganda proportion of it and had it recorded in the zemindary Sheristah in the name of Bowannay Charan Roy. Thus the 11½ annas share of the Perganah became the joint property in equal proportions of Joynarain Roy and Gocool Ghosaul and they jointly possessed it in these proportions until the Bengal year 1179 when at their mutual request to Mr. Barwell the division of it between them was made and each had his share of the land allotted to him. Gocool Ghosaul's share continue complete as allotted him in this division and is now the property of Cassinaut in consequence of the public sale made of it to him in the Bengal year 1196. The other share of 5 annas 15 ganda remaining with Joynarain Roy falling in arrear to Government the sale of a moiety or 2 annas 17 gandas 2 kara division of it was made in 1189 B. S., of the liquidation of the balance and in the following year the division of it was made between the purchaser Joynarain Ghosaul in the name of his son Colly Sankar Ghosaul, and Joynarain, whereby each had his proportion of the land allotted to him and in the same year, the heirs of the latter made a subdivision of their share of 2 annas 17 gandas 2 kara in the following proportions:—

				g.	c.
Shibnarain	...	...	...	18	2
Doolabnarain	...	...	...	13	0
Odoynarain	...	...	...	13	0
Luckinarain	...	...	...	13	0

The Board will perceive from the above that so far from the Perganah being the joint undivided property of the several shares as stated by my predecessor it has undergone the most perfect and complete division practicable, into sixteen portions which accord with the number of the present proprietors, as well as with the numbers of shares stated in the public Rent Roll of the District, and from the information obtained on the fullest enquiry, I can with confidence assure the Board a more perfect Division of it between the numerous sharers cannot be made than the one which now

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stands. The late Collector must, I apprehend, have been led into the error of stating it as the joint undivided property of the numerous proprietor from the Representations of some of the Talukdars stating the inconveniences which they suffered from having their Revenue to pay to three or more sharers; this is an inconvenience which I admit some of them do labour under, but I submit it to the Board whether it could have been avoided in the Division of a Pargana among so many Proprietors, and whether it was not the less to be avoided in the one in question where many of the Talukdars hold land paying a Revenue exceeding several of the Proprietors' proportion in the Pargana and which consequently rendered the Division of it between them unavoidable, and although the instances where a Talukdar pays his Revenue to plurality of shares are many in Selimabad, yet I must observe there are few where the Lands composing the Taluks have not undergone a Division between them, so as to define to each proprietor the proportion and particular soil responsible to him for the Revenue as comprised and included in his share of the Pargana and upon the whole, I beg leave to offer it as my opinion that for the reasons abovementioned the inconveniences which exist in the present Division of the Zemindary, could not be remedied by a new one, while the latter on its operation would make an exchange of the property between the shares to the benefit of some and proportionate disadvantage of others.

The Board will therefore judge how far it may be advisable to make the Division directed by the Governor-General in Council at their recommendation given under the erroneous information submitted to them by my predecessor, indeed whether it be practicable or not, without giving just cause of complaint to some of the sharers, who will be sufferers by the exchange of their property, I am so fully satisfied, gentlemen, in my own mind that it cannot be effected without giving this just cause of complaint and that the new Division can but in a very few instance, remedy the inconvenience complained of in the present one, that I have thought it best not to proceed in it, persuaded it was never your intention to recommend a Division where it had this tendency, and at the same time could not but very partially remedy the inconvenience proposed by it. Although for the above reasons I have not proceeded in the Division, yet I have deemed it proper to avail myself of the measurement made of the Perganna for it to ascertain by a Jummadundy its actual assets in order to form a judgment how far these would admit of the resumption of a part

of the large abatements amounting to Rs. 13000, granted to the 11½ anna Division of it since the year 1193 B. S. exclusive of the loss which Government has sustained annually on this reduced Jama amounting averagely to Rs. 19000. I conceived on investigation of the nature the more necessary as a perusal of Mr. Douglas's correspondence with your Board on the subject of this mahall gave great reason to suspect that the abatement in question had not been altogether rendered necessary by any actual decline of its resources, but partly by the refractory conduct of some of the Talukdars refusing to pay the proper and just Revenue of their lands to the Zemindars and partly by the intrigues of others with the Zemindary servants obtained from them improper deductions as stated in his letters under date the 14th January, 12th April and 8th of October 1791.

As far as a judgment can be formed from the Jammabandy, these suspicions seem to be well grounded inasmuch as the assets thereby appear nearly sufficient to admit of the resumption of the whole amount of the abatement but to obtain it will require rigorous measures both towards the Zemindars and Talukdars, and am fully satisfied, Gentlemen, that neither have one just objection to make to the Jammabandy and so far from its being oppressive that it is fair if not very moderate, I can have no hesitation to give my recommendation that such measures be taken in all instances requiring them and that the lands, whether the instance be with the Zemindar or Talukdar be formed where refused by either on the terms of the Jammabandy and where they cannot substantiate any reasonable and just objection to it. I am compelled to call upon your Board for this authority in the conviction that without it no exertions of mine will affect the resumption of any part of the abatement in a Parganah the renters whereof have ever shown themselves disobedient and of the most refractory disposition, and whose conduct has annually baffled the attempts of the executive officers to realize even the Revenue which they are pleased themselves to admit as justly payable by them, but it cannot be necessary for me, Gentlemen, to dwell on the misconduct of these renters where so much of it already appears upon your records in the repeated representation made by my predecessors in my office.

The vesting me with the requested authority to form all lands in the cases stated will, I have every reason to believe, enable me to complete the settlement of the Parganna in the course of the current year, with the resumption of a great part of the abatement, but without such authority I must here again repeat it to the Board the

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very and I may say incredible, refractory disposition of the people, will not allow me to entertain the hope of realizing the present rated Jamma, and to conclude a settlement without an abatement from it, will be altogether impracticable. *Your* Board will therefore decide under the information herein submitted respecting the capability of the mehal whether such conduct shall benefit the object which instigates it and whether the abatement shall be allowed and the resumption proposed, be foregone, or whether it will not be more proper to notice it by punishment, bearing out of the consideration the justice of the claim which Government has to the resumption.

In conclusion, permit me to pledge myself to your Board for the measures proposed by me proving efficacious and that it is my opinion, few instances will occur to render the exercise of the requested discretionary power necessary, it being my belief the knowledge that I possess it will in general prove sufficient. The Board at all events may rest assured that I will in no instance avail myself of it to oppress and I do hope that I hold a better place in their opinion than to be suspected of soliciting it with any such intention.

Allow me to beg your instructions on the subject of the address as early as convenient.

I have the honour to be,
Gentlemen,

Dacca
The 28th December, 1793.

Your most obedient humble servant,
(Signed) G. Thompson
Collector.

It is interesting to compare these shares with the shares now registered in the books of the Collector—

No. of estate.					Share
					Anna Gandas.
3834	...	...	...	0	6 $\frac{1}{4}$
3836	...	...	...	0	7
3840	...	...	...	5	15
3841	...	...	...	2	17 $\frac{1}{2}$
3842	...	...	...	0	18 $\frac{1}{2}$
3843	...	...	...	0	13
3844	...	...	...	0	13
3845	...	...	...	0	13
3846	...	...	...	0	12 $\frac{1}{2}$
3847	...	...	...	0	9 $\frac{1}{2}$
3848	...	...	...	0	9 $\frac{1}{4}$
3849	...	...	...	0	9 $\frac{1}{2}$

This requires to be supplemented by a share of 1 anna $16\frac{1}{2}$ gandas to make up 16 annas. This missing share was composed of $17\frac{1}{2}$ gds., 5 gds., $10\frac{1}{2}$ gds. and 4 gds. mentioned in the above letter.

It may be observed that estates 3842-3845 make up 2 annas $17\frac{1}{2}$ gandas, which together with estate 3841, make up 5 annas 15 gandas; this taken with estate 3840 makes a share of $11\frac{1}{2}$ annas. Estates 3846-49 make up 2 annas, and these together with the remaining shares, namely, estates 3834 and 3836 and the four shares aggregating 1 anna $16\frac{1}{2}$ gandas make up $4\frac{1}{2}$ annas. If these shares are borne in mind, the various documents may be easily understood; this also bears out that there was originally a division of the Pergana into two shares $11\frac{1}{2}$ annas and $4\frac{1}{2}$ annas respectively.

In the second place, it is plain that absolute reliance cannot be placed upon the Thak Map. It is clear that the Mahal Milani statements were prepared only on reference to the original state of the mahal pending the decisions in the Adam Nisani and miscellaneous cases then under contest. This must be borne in mind in the examination of the long series of documents in the case.

As regards the first position taken up by the appellants, we have only to observe that it cannot possibly be sustained. Assume that the first defendant had annexed the disputed lands to the under-tenures claimed by her and had acquired a good title thereto by adverse possession for the statutory period against the true owners. That does not avail the plaintiffs, as they have purchased estate 3846 and nothing beyond it. Take two contiguous estates A and B, held by X and Y. Suppose X annexes a portion of B and professes to hold it as included in A, till the title of B is extinguished. If thereafter X makes default in the payment of Government revenue, what does the Collector expose for sale? Obviously estate A as it stood at the time of the Permanent Settlement; he does not put up to sale the portion of B annexed to A by X. Similarly, if Y had defaulted to pay revenue, the Collector would expose for sale estate B as it stood at the time of the Permanent Settlement and would not exclude from the sale the portion annexed by X. The substance of the matter is that the purchaser at the revenue sale is not prejudiced by an encroachment against the defaulting proprietor; nor does he reap the benefit of an encroachment by the defaulter. To put the matter in another way, the effect of the adverse possession by X with regard to the lands of B is to make him a joint proprietor of B along with Y.

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The Collector is nowise affected by the adverse possession between the proprietors of A and B and if he has occasion to sell either estate, he sells the estate as it was at the time of the Permanent Settlement. Here the plaintiffs have purchased estate 3846; they are entitled to all lands included in the estate at the time of the Permanent Settlement; they cannot have the advantage of, any more than they can be prejudiced by, adverse possession subsequent to that date. The first contention, consequently, fails.

As regards the second position taken up by the appellants, obviously it cannot be sustained. The plaintiffs in an action in ejectment must succeed on the strength of their own title; they cannot succeed, merely because the defendants may not be able to establish title to all the lands in their possession; in other words, the plaintiffs as purchasers of estate 3846 cannot oust the defendants from lands, which, though not included in the estates claimed by them, are equally outside the estate purchased by the plaintiffs.

As regards the third point taken up by the appellants, we may observe that this covers the real controversy between the parties. The Subordinate Judge has rejected without discrimination the documents adduced by the plaintiffs to prove that the disputed lands are the joint lands of estates 3846-3849. No doubt, many of these documents are not registered, but they are of some antiquity; many of them were mentioned in the litigation of 1863. It is further clear that they have not been fabricated by the present plaintiffs, and the very fact that they are inconsistent with the extreme case of the plaintiffs that the disputed lands are included in estate 3846 alone removes them from the sphere of indiscriminate suspicion; if the plaintiffs had manufactured these documents for the purposes of this suit, they might well have been drawn up to support their maximum claim. These documents, which disclose the dealings of the various parties with separate parcels of land as included in one or other of the shares on definite partitions by metes and bounds in Perganna Selimabad are obviously of value, as embodying assertions of title in times now long past. The letter of Mr. Thompson, as we have seen, proves conclusively that there was a partition prior to 1793, and that many of the estates then and now existing had separate parcels of land allotted to them before the Permanent Settlement. The question thus narrows down to this: have the plaintiffs proved that the disputed lands or any portion thereof were at the time of the Permanent Settlement the separate lands of the 2 annas share now represented by

estates 3846-3849. In the investigation of this question, we are materially assisted by the proceedings in a suit for assessment of rent brought by Manikya Chandra Das against Mahes Chandra Biswas and decided by the Deputy Collector of Bakergunj on the 23rd November, 1864 and by this Court on the 17th November 1865 (Exhibits 618, 619). In that suit, a careful survey was made by Gopalgobinda Das, Civil Court Amin. His report dated the 30th September, 1864 (Ex. E 49) and his map have been exhibited in this case. The report not only sets out the then contentions of the parties, but also the previous history of the estate; the report also mentions earlier documents not now available. The plaintiff in that litigation claimed title in Baldia as a tenure-holder of the 5 annas 15 gandas share of Raja Satyasaran Ghosal, now estate No. 3840. The principal objector was Ananda Chandra Guha, who claimed to hold a tenure under the 2 annas $17\frac{1}{2}$ gandas share of the Chaudhuris. Consequently, the questions arose whether Baldia had been partitioned and what land was held by the then tenant defendant in Baldia under the 5 annas 15 gandas share of the Raja Bahadur. It was decided that there had been a partition, and that plots 5, 8, 14 of the then Amin's map belonged to the Raja Bahadur's share. We may observe here parenthetically that in the Thak Map it is admitted that the 2 annas share-holders occupy more than 2 annas share of Baldia, because the $12\frac{1}{4}$ gandas share is recorded as an actual $16\frac{1}{4}$ ganda share, while each of the $9\frac{1}{4}$ ganda share is represented as $13\frac{1}{8}$ ganda share; that is, the 2 annas or 40 gandas share exceeds that share in the Thak map. The plots now in dispute are plots 1, 2, 3, 4, 6, 7, 9, 10 and 11 of the map of 1864. We have taken the documents produced in this case one by one and have compared the boundaries with those of the plots marked in the map of 1864. As regards Plot 13 of the Map, it appears from Ex. 258 to have been treated as included in the $13\frac{1}{4}$ ganda share, from 1796, or, if this document be rejected, as not duly proved, it has been proved to have been so included since 1837. Plots 5, 8 and 14 of the Map have been proved to have been treated since 1823 as included in the Raja Bahadur's $5\frac{1}{4}$ annas share. The real difficulty in the case is as to the history of the two shares of 2 annas $17\frac{1}{2}$ gandas each, now represented by estate 3841 on the one hand and estates 3842-45 on the other. There is also some doubt as to how much of the disputed land has been treated as included in the 2 annas share represented by estates 3846-49 and the difficulty is enhanced by the fact that conflicting claims have

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been from time to time put forward in respect of some of the lands. Thus from the Map and report of the Amin of 1864, we find that Kasinath Das claimed plots 1, 2, 3 and 4 as his mal taluk, while Nobin Chandra Pal claimed plots 2 and 4 as his mal taluk. Nobin Chandra Pal was not able to produce any document to show that he had a mal taluk at all, while Exhibits 564 and 565, which give the eastern boundary of Kasinath Das taluk, enables us to identify it as plot 3 of the map of 1864; in fact, the eastern boundary is a line drawn from the Chami khal to meet the Buinar khal and the Dubi khal. The line thus drawn is, as appears from an inspection of the Map, most probably the dividing line between the original $11\frac{1}{2}$ annas and $4\frac{1}{2}$ annas shares. Plots 1, 2, 4, 5, 8 and 14 thus constituted $11\frac{1}{2}$ annas share, while plots 3, 6, 7, 10, 11, 12 and 13 were the $4\frac{1}{2}$ annas share. It follows that plots 3, 6, 7, 9, 10, 11 and possibly plot 12 constituted the 2 annas share. This furnishes a reasonably accurate location and sub-division of the original $4\frac{1}{2}$ annas share. We need not consider in detail whether plot 12 was in the 2 annas share or in the $5\frac{1}{4}$ annas share composed of the two $2\frac{1}{8}$ annas share each. The latter hypothesis is wholly untenable, notwithstanding Exhibits 154, 165, 206 and 208, which contain statements made by the parties to suit their needs for the moment; as we know many of the statements made by Mohes Chunder Biswas in the suit of 1854 were untrue. We are clearly of opinion that the two 2 annas $17\frac{1}{2}$ gandas share lay to the north of the Raja Bahadur's 5 annas 15 gandas share and that when subdivided, the Chaudhuri's half share was taken to the north and the Raja Bahadur's to the south. The Chaudhuri's half share was contiguous to their 2 annas share on south and west, and the Raja Bahadur's half share was contiguous to his $5\frac{1}{4}$ annas share to the north. The lands were mixed up respectively with the 2 annas share and the $5\frac{1}{4}$ anna share for purposes of measurement, and thus apparently went out of sight. The conclusion follows that the plaintiff have established that there was a partition prior to 1793, and that plots 3, 6, 7, 9, 10 and 11 of the Map of 1864 fell to the 2 annas share now represented by estates 3846-3849. Consequently the plaintiffs are entitled to a decree for possession of these plots only, in respect of a $12\frac{1}{2}$ gandas share out of 2 annas that is, if the 2 annas be treated as 16 annas, the plaintiffs are entitled to a decree for possession of 4 annas 18 gandas share of plots 3, 6, 7, 9, 10, 11 only. The Subordinate Judge, however, has given them a decree for $16\frac{1}{2}$ gandas share of all the plots in suit. As the defendants have not filed an independent appeal or

preferred a memorandum of cross-objections, we cannot on an appeal by the plaintiffs, deprive them of the benefit of any portion of the decree already made in their favour by the Subordinate Judge.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified. The decree in favour of the plaintiffs for $16\frac{1}{4}$ gandas share of all the lands claimed in the suit is maintained. In addition to this, the plaintiffs are awarded in respect of plots 3, 6, 7, 9, 10, 11 of the Map of 1864 a further decree for 4 annas $1\frac{1}{4}$ gandas share, so as to bring up their share in those plots only to 4 annas 18 gandas. The plaintiffs will have joint possession of the lands now decreed in their favour and also mesne profits in the way directed by the Subordinate Judge. We set aside the order for costs made by the Subordinate Judge and direct that all parties pay their own costs both here and in the Court below.

A. T. M.

Appeal allowed in part.

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Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.

HARI NATH CHAUDHURY

v.

HARADAS ACHARYA CHAUDHURY & OTHERS,*

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Suit, maintainability of—Money paid under legal process, if and when recoverable—Bonafides of party receiving money—Money paid, if ceases to be payer's money—Court's power to order money to be brought—Civil Procedure Code (Act V of 1908), section 151, O. 21, R. 46 and O. 21 R. 46 (3)—Rules of the Supreme Court in England, O. 45 Rr. 5, 6—Attachment of debt ostensibly payable to one not a judgment-debtor—Necessity of enquiry—Judicial order to the detriment of a person.

Where money has been paid by the plaintiff to the defendant under compulsion of legal process which is afterwards discovered not to have been due, he cannot recover it back in an action for money had and received. There must be bonafides on the part of the party who has got the benefit of the opponent's payments. If the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the defendant will recover the money back.

* Appeal from Appellate Decree No. 3656 of 1913, against the decision of Babu Annada Kumar Sen, Subordinate Judge of Mymensingh, dated the 11th August, 1913, confirming that of Moulti Lutfur Rahman, Munsiff of Mymensingh, dated the 17th July, 1912.

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Clause (3) of rule 46 of order 21 of the Code of Civil Procedure contemplates a case where there is no dispute that if the suit results into a decree against the defendant or if there is a pre-existing judgment against him, the money is recoverable thereunder from the depositor.

No judicial order can be made to the detriment of a person till he has been afforded ample opportunity to defend his rights.

Rule (5) of Order 45 of the Rules of the Supreme Court in England contemplates, not an *ex parte* order to the prejudice of third persons, who may be really interested in the debt due from the garnishee, but an enquiry in the presence of all the persons interested.

The Civil Procedure Code does not contain any specific rule of the type of rules 5 and 6 of order 45 of the Rules of the Supreme Court in England. But the Courts in India have inherent power to guard against an abuse of its process and to ensure that its order do not operate to the prejudice of persons who have no notice of the proceedings.

A sued B for recovery of money. On the same day, A obtained an order for attachment before judgment under rule 5 of order 38 of the Code of Civil Procedure. The property attached was a debt due ostensibly from C to D; but the debt was attached on the allegation that B and not D was the person beneficially interested in it. A prohibitory order was passed upon C. On the 13th August, 1909, A obtained an *ex parte* decree in his suit against B. C was then called upon to pay into Court the money due from him ostensibly to D. On the 8th October, C applied to the Court and intimated that he was willing to bring the money into Court, provided he was absolved from liability to pay a second time to D, and provided also that interest ceased to run upon his debt from that date. The Court thereupon ordered that the money, if deposited, would be detained in Court till the adjudication of the question whether B or D was beneficially interested therein. On the faith of this order, the money was brought into Court on the 13th December, 1909. Thereafter, without notice to C or D, the Court, on the application of A, paid out the money to him. D, who had no intimation of these proceedings, subsequently sued C and recovered judgment against him on the debt. C then brought a suit to recover the money deposited by him in Court and which without notice to him or to his creditor D, had been withdrawn by A. It was found as a fact that D and not B was the real creditor of C :

Held, that the suit was maintainable.

Ward v. Wallis (1) followed.

That it was incumbent upon the Court to make a conditional order of the description and to provide that the money deposited was not paid to the decree-holder till adjudication of the question of title to that property.

That the money did not cease to be the money of the plaintiff, merely because he had brought into Court on the faith of a conditional order which directed its retention in Court pending enquiry into the question raised.

That the Court had full authority to compel the defendant to bring back the money into Court to be repaid to the plaintiff.

Mrinalini v. Abinash (1) referred to.*

Appeal by the Defendant.

Suit for recovery of money.

The material facts and arguments appear from the judgment.

Mr. A. Guha, Babus Birendra Kumar Dey and Akhilbandhu Guha, for the Appellant.

Babus Jyoti Prosad Sarbadhikary and Prokas Chunder Mazumdar, for the Respondents.

The judgment of the Court was delivered by

Mookerjee J.—The problem which requires solution in this appeal may be concisely stated. On the 30th June 1909, A sued B for recovery of money. On the same day, A obtained an order for attachment before judgment under Rule 5 of Order 38 C. P. C. The property attached was a debt due ostensibly from C to D; but the debt was attached on the allegation that B and not D was the person beneficially interested in it. The result was that a prohibitory order was issued upon C. On the 13th August 1909 A obtained an *ex parte* decree in his suit against B. C was then called upon to pay into Court the money due from him ostensibly to D. On the 8th October, C applied to the Court and intimated that he was willing to bring the money into Court, provided he was absolved from liability to pay a second time to D, and provided also that interest ceased to run upon his debt from that date. The Court thereupon ordered that the money, if deposited, would be retained in Court till the adjudication of the question whether B or D was beneficially interested therein. On the faith of this order, the money was brought into Court on the 13th December 1909. Thereafter, without notice to C or D the Court, on the application of A, paid out the money to him. D, who had no intimation of these proceedings, subsequently sued C and recovered judgment against him on the debt. C now sues A to recover the money, which he had deposited in Court and which without notice to him or to his creditor D, had been withdrawn by A. The Courts below have decreed the claim and A has appealed to this Court. The substantial question in controversy on the merits in this litigation, consequently, plainly is, whether B or D was beneficially interested in the debt. The Courts below have concurrently answered this against A, and have found that B had no interest in the money, in other words, not B but D

(1) (1910) 11 C. L. J. 533.

[* See also *Nabin Kali v. Banalata* (1905) 1 L. R. 32 Calc. 921; 2 C. L. J. 595; *Jogesh v. Yakub* (1912) 17 C. W. N. 1057 (1059); and *Gopal v. Hari Mohan* (1915) 21 C. L. J. 624 (626)—Rep.]

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was the real creditor of C. This is a finding of fact which cannot be successfully challenged in second appeal ; indeed, no attempt has been made to assail it before us ; but the question has been mooted, has C any cause of action against A ? On behalf of A, it has been argued that there is no cause of action, *first*, because the money was recovered under compulsion of legal process and cannot accordingly be recovered by any form of suit ; and *secondly*, because by virtue of order 21, Rule 46, of the Code of Civil Procedure, the money, as soon as deposited, cease to be the money of the plaintiffs, and, that, consequently, he is not entitled to recover it back. In our opinion there is no foundation for either of these contentions.

As regards the first ground, it is clear that the principle of the rule in *Marriot v. Hampton* (1) which has been the bulwark of the argument for the appellant, is of no real assistance to his cause. The principle is that where money has been paid by the plaintiff to the defendant under compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received. The foundation of this doctrine was thus stated by Lord Kenyon : "After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person." To the same effect is the observation of Grose J : "It would tend to encourage the greatest negligence, if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence." Lawrence J added that if the case alluded to, that is the decision of Lord Mansfield in *Moses v. Macferlan* (2) be law, it would go the length of establishing this, that every species of evidence which was omitted by accident to be brought forward at the trial, might still be of avail in a new action to overrule the former judgment which is too preposterous to be stated. The principle was again formulated by Patterson J. in *Duke De Cadaval v. Collins* (3) : "Money paid under compulsion of law cannot be recovered back as money had and received ; and, further, *where there is bonafides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." We refer to this statement in order to emphasise the qualification to the general rule formulated in the following terms by Kenedy J. in *Ward v. Wallis* (4) : "There must be *bona fides* on the part of the

(1) (1797) 7 T. R. 269 ; 2 Smith's L. C. 420 (11th Ed.) 421.

(2) (1760) 2 Burr. 1005 (1009).

(3) (1836) 4 A. & E. 858 (866).

(4) (1900) 1 Q. B. 675.

party who has got the benefit of his opponent's payments in order to bring the principle laid down in that case *Marriott v. Hampton* (1) into force ; if the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle laid down in *Marriott v. Hampton* (1) may not prevent the defendant from recovering the money back."

Let us examine the application of this principle to the circumstances of the present case. Here, money was deposited by the plaintiff C on the faith of an order which stated explicitly that the money would be retained in Court, pending the determination of the question, whether the money belonged to B, the then judgment-debtor of A, or to D the alleged creditor of the depositor C. That enquiry was never made ; but the Court, without notice to the depositor and his alleged creditor paid out the money to the present defendant, on his application, so that neither C nor D was allowed an opportunity to defend his rights. We need not hold that the conduct of A was in any way designedly fraudulent, but this much is plain that he was able to appropriate the money by what constituted a grave abuse of the process of the Court. The principle of the decision in *Marriott v. Hampton* (1) has no application to these circumstances.

As regards the second ground, it is contended that under order 21, rule 46, the money, as soon as it was deposited, ceased to be the money of the depositor. Clause (3) of Rule 46 is in these terms : A debtor prohibited under clause (1) of sub-rule (1) may pay the amount of his debt into Court and such payment shall discharge him as effectually as payment to the party entitled to receive the same. This clearly contemplates a case where there is no dispute that if the suit results into a decree against the defendant, or if there is a pre-existing judgment against him, the money is recoverable thereunder from the depositor. In the present case, the deposit was clearly conditional. The order of the Court makes it plain beyond all controversy that the deposit was made pending the adjudication of the question whether B or D was beneficially interested in the money. But it has been contended on behalf of the appellant that this order was irregular, as the Code neither contemplates an enquiry, nor provides for the issue of notices upon parties affected by its order. This argument overlooks the elementary principle that no judicial order can be made to the detriment of a person till he has been afforded ample

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opportunity to defend his rights. Our attention has been drawn in this connection to rule 5 of order 45 of the Rules of the Supreme Court in England. An examination of that rule shows that there is no foundation whatever for the contention of the appellant. There the rules expressly provide for an enquiry in the event which have happened here. Rule 5 is in these terms: "Whenever in any proceedings to obtain an attachment of debts, it is suggested by the garnishee that the debt sought to be attached belongs to some third person or that any third person has a lien or charge upon it, the Court may order such third person to appear and state the nature and particulars of his claim upon such debt." Rule 6 then provides that after the allegations of any third person under such order as in rule 5 mentioned and of any other person who by the same or any subsequent order may be ordered to appear or in case such third person not appearing when ordered, the Court may order execution to issue to levy the amount due from such garnishee. Consequently the rules of the Supreme Court in England contemplates, not an *ex parte* order to the prejudice of third persons who may be really interested in the debt due from the garnishee, but an enquiry in the presence of all the persons interested. Our Code does not contain any specific rule of the type of rules 5 and 6 of order 45 of the rules of the Supreme Court in England. But the Court has inherent power to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who have no notice of the proceedings. In the case before us, the Court was competent,—indeed, it was incumbent upon the Court,—to make a conditional order of this description and to provide that the money deposited was not paid to the decree-holder till adjudication of the question of title to that money. Reference may in this connection be usefully made to the instructive decision of the Court of Appeal in *Roberts v. Death* (1). In that case, the garnishee who was ordered to bring the money into Court, contended that the money was due to the judgment-debtor, not in his personal capacity but in his capacity as a trustee. The question arose, whether the money, if deposited, should be paid without enquiry. Lord Justices Brett, Cotton and Lindley unanimously held that it would not be right to make the payment without an enquiry into the question, whether the money was trust money or not, and they directed that the money should be brought into Court to abide the event of an enquiry. In our opinion, the money deposited in

this case, did not cease to be the money of the plaintiff, merely because he had brought into Court on the faith of a conditional order which directed its retention in Court pending enquiry into the question raised.

We feel no doubt whatever that the justice of the case lies entirely with the respondent and that the Court has full authority to compel the appellant to bring back the money into Court to be repaid to the plaintiff: *Mrinalini v. Abinash* (1).

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1910) 11 C. L. J. 533.

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PRIVY COUNCIL.

PRESENT *Viscount Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.*

BHUPENDRA KRISHNA GHOSE & ANOTHER,

v.

AMARENDRA NATH DEV & ANOTHER.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL].

P. C.

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*October, 19, 20
and
November 15.*

*Hindu Law—Dayabhaga School—Will—Construction—Executory gift over—
Period of distribution—Indian Succession Act (X of 1865), section 111.*

Under the Dayabhaga school of Hindu law a testator can attach to an authority given by his will to his widow to adopt a son to him a direction that her estate should not be interfered with or divested during her life.

Section 111 of the Indian Succession Act embodies the rule of construction of wills enunciated in *Edwards v. Edwards* (1). It has been considerably modified by later English decisions, and although the said Act has given it statutory force, the rule should be applied only to cases strictly coming within its scope and does not apply to the case where the testator mentions in his will the event on the occurrence of which the distribution is to take place.

The will of a Hindu governed by the Dayabhaga school of Hindu law after revoking all prior testamentary writings and appointing his wife as the sole executrix thereof proceeded as follows: "I hereby authorise my said wife to adopt

(1) (1852) 15 Beav. 357.

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Dattaka Putra. In case of death of an adopted son my said wife shall adopt one after another five sons in succession. If my said wife dies without adopting a son or if such adopted son predecease her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister Srimati Benodini Dasi who may be living at the time of my death."

There were two sons of the testator's sister living at his death. His widow, who had obtained probate of the will, adopted a son who predeceased her unmarried, and she herself died shortly thereafter :

Held, that the testator's estate vested in his widow as his legal representative and remained in her possession until her death ; that the estate, which was in the widow during her life, could pass only to the adopted son who survived her or in case of his death during her lifetime to his male issue if he left any ; and that on her death the gift over (which was expressly declared to take effect after her death) to the testator's nephews took effect and his estate passed to them.

Held, also, that the event on the occurrence of which the distribution was to take place was distinctly mentioned as being the death of the widow and the gift over to the nephews was not affected by section 111 of the Indian Succession Act.

Bhupendra Krishna Ghose v. Amarendra Nath Dey (1) affirmed.

Appeal from a decree of the High Court of Judicature at Fort William in Bengal, dated the 28th November, 1913, confirming a decree of a single Judge of the said High Court, dated the 19th June, 1912.

The principle question in the appeal related to the validity of a bequest in favour of the respondents contained in the will of one Herambo Nath Ghose, a Hindu governed by the Dayabhaga school of Hindu law, (hereinafter called the testator), who died on the 10th November, 1907, leaving as his sole heir his widow, Poritoshini Dasi.

By his will the testator, after appointing the said Poritoshini Dasi his executrix and authorizing her to adopt, provided for the devolution of his estate (subject to certain minor provisions) in the following terms :—

"If my said wife dies without adopting a son, or if such adopted son predeceases her, without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister Srimati Benodini Dasi, who may be living at the time of my death."

On the testator's death his widow applied for and obtained probate of the will. On the 3rd August, 1909, she adopted one Hem Chunder, who died on the 11th March, 1910, an infant unmarried and intestate. The widow died on the 16th March, 1910.

The respondents were the sons of the said Benodini Dasi and were living at the time of the testator's death.

Immediately after the death of the widow the suit out of which the present appeal arose was instituted on the Original Side of the said High Court by Srimati Kissorimoni Dasi, the mother (by adoption) of the testator, claiming the said estate as the next heir of the said Hem Chunder and praying that the will might be construed and the rights of all parties thereunder ascertained and declared, and for other reliefs.

The said Kissorimoni Dasi died on or about the 26th September, 1910, and one Trailokya Nath Ghose, who claimed to be the next reversionary heir of the said Hem Chunder, was substituted in her place.

The suit came on for trial before Mr. Justice Fletcher, who, without recording evidence as to the alleged adoption, dismissed it with costs, holding that the bequest in favour of the respondents was a valid one in law and would not be displaced or affected by such adoption if established. He was of opinion that it was perfectly competent to a Hindu testator to regulate the course of devolution of his estate after his death provided he kept within the limits laid down by law; that the creation of such an interest as was given by the said will to the respondents was not in any way repugnant to Hindu law; and that it did not offend against the provisions of section 111 of the Indian Succession Act, and was expressly authorized by section 107 of the said Act, both the said sections being applicable to Hindus under the provisions of section 2 of the Hindu Wills Act.

The said Trailokya Nath Ghose appealed against the said decree, but his appeal was dismissed. The learned Judges of the appellate Court were of opinion that the bequest in favour of the respondents was valid; that its effect was not to divest an estate which had already vested in the said adopted son but that he took in effect only a limited estate subject to the gift over to the respondents; and that there was nothing in the law by which the parties were governed which made the bequest of a legacy or of an estate on a future contingent event invalid. For a full report of the judgments of the Courts below see *Bhupendra Krishna Ghose v. Amarendra Nath Dey*, (1). On the death of Trailokya Nath Ghose the appellants were brought on the record as his representatives.

Sir Robert Finlay, K. C., Upjohn, K. C., Sir William Garth, and Dunne, for the Appellants: The Courts in India have relied

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upon *Srinamby Soorjeemoney v. Denobundoo Mullick* (1) where an executory gift over by a Hindu was upheld, and have imported in considering the present case the English law as to executory bequests. But that case does not decide that all incidents of the English law of executory bequests are applicable to Hindu wills: *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry* (2). A Hindu has testamentary power within the limits which the Hindu law prescribes to alienation by gift *inter vivos*, and therefore to support a gift *in future* under a will there must be a gift *in presenti* thereunder: *Baboo Beer Pertab Sahoe v. Maharajah Rajender Pertab Sahoe* (3); *The Tagore Case* (4); *Amrito Lal Dutt v. Surnomoyi Dasi* (5); and Mayne's Hindu Law, 8th ed., p. 509, para. 376.

(Viscount Haldane referred to para. 196, p. 258 of Mayne's Hindu Law.)

Here there is no gift by implication or otherwise to either the widow or the adopted son, and as the succession vests immediately upon the death of the last owner and cannot remain in abeyance, the gift over to the testator's nephews is unknown to Hindu law and inoperative and void: *Bai Motivahoo v. Bai Mamooabai* (6); and *Gordhandas v. Bai Ramcoover* (7). The adopted son here took the testator's estate by inheritance and not by devise and the adopted son's estate could not subsequently be divested and must go on his death to his heirs, the present appellants: *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry* (8); and *Kally Prosonno Ghose v. Gocool Chunder Mitter* (9). The vesting of the estate in the widow as the executrix for administrative purposes could not affect its devolution according to law or validate the contingent executory bequest to the nephews, and in any case the widow's right as executrix ceased when she made the adoption.

The bequest to the nephews is bad under section 111 of the Indian Succession Act, inasmuch as it was intended to take effect, if at all, on the happening of two specified uncertain events, namely the death of the widow (a) without having adopted or (b) after the death of the adopted son without leaving male issue, and no time

(1) (1862) 9 M. I. A. 123.

(2) (1865) 10 M. I. A. 279 (308).

(3) (1867) 12 M. I. A. 1 (37 and 38).

(4) (1872) L. R. Suppt. Vol. 47 (66 and 67).

(5) (1898) I. L. R. 25 Calc. 662 (690 and 691).

(6) (1897) L. R. 24 I. A. 93 (104 and 105); I. L. R. 21 Bom. 709.

(7) (1901) I. L. R. 26 Bom. 449 (467).

(8) (1865) 10 M. I. A. 279 (311).

(9) (1877) I. L. R. 2 Calc. 295

is mentioned in the will for the occurrence of those events and neither of them happened before the period when the fund was distributable, namely the death of the testator or the time of the adoption: *Narendra Nath Sirvar v. Kamalbasini Dasi*(1); and *Manikyamala Bose v. Nanda Kumar Bose*(2); and Trevelyan's Hindu Law, p. 118.

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(*Lord Wrenbury*: The period of distribution in the will is the death of the widow and when such a period is mentioned by the testator section 111 does not apply.)

Yes, it would: see Illustration (d) to that section; Reference was also made to Mayne's Hindu Law, 8th ed., p. 869, para. 624; and section 112 of the Indian Succession Act.

De Gruyther, K. C. (*Dube* with him), for the Respondents: (Their Lordships asked counsel to deal first with the argument under section 111 of the Succession Act.)

That section puts in statutory form the decision in *Edwards v. Edwards*(3), which was considered in *O'Mahoney v. Burdett* (4) and has been considerably modified. It is simply a rule of construction. The section does not lay down any positive law and imposes no restriction on the testator's power to mention the period of distribution. When a testator mentions such a period, as in the present case, the section has no application. He referred to section 107, illustrations (f) and (g), of the Indian Succession Act, and *Radha Prosad Mullick v. Ranimoni Dasi* (5); and *Chunilal Parvatishankar v. Bai Samrath* (6). In the case in I. R. 23 I. A. 18 the will was exactly in the words of Illustration (b) of section 111 of the Succession Act. He was stopped on this point and asked to construe the will.

If the will had some such words as "my adopted son would take the estate," it is admitted that the gift over would be valid. But in dealing with Hindu wills a Hindu must be taken to know Hindu law, and the testator must have known that as a son would be adopted to him under the power given by the will, the adopted son would take the estate under the will. It is contended that there must be a gift *in presenti* to support a gift *in futuro*, but a Hindu has been held to have a power of appointment under a

(1) (1896) L. R. 23 I. A. 18; I. L. R. 23 Calc. 563.

(2) (1906) I. L. R. 33 Calc. 1306. (3) (1852) 15 Beav. 357.

(4) (1874) L. R. 7 H. L. 408.

(5) (1908) L. R. 35 I. A. 118; I. L. R. 35 Calc. 896.

(6) (1914) I. L. R. 38 Bom. 399.

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will: *Bai Motivahoo v. Bai Mamooabai* (1). He also referred to *Kalidas Mullick v. Kanhya Lal Pundit* (2), and was then stopped.

Sir Robert Finlay, K. C., replied, referring to Mayne's Hindu Law, 8th. ed., p. 512, para. 377, and distinguishing the case in L. R. 24 I. A. 93.

The judgment of their Lordships was delivered by

November, 15.

Mr. Ameer Ali :—This is an appeal from a judgment and decree of the High Court of Calcutta pronounced in a suit which relates to the will of one Herumbo Nath Ghose, a Hindu inhabitant of the town of Calcutta, subject to the Dayabhaga school who died on the 10th of November, 1907.

The material portion of the will, which bears date the 16th June, 1898, is in the following terms :—

"This is the last will and testament of me Herumbo Nath Ghose of No. 45 Pathuriahata Street Calcutta, son of Girindra Chunder Ghose, deceased zemindar. I revoke all prior testamentary writings and appoint my wife Srimati Poritoshini Dassi to be the sole executrix of this my will. I hereby authorize my said wife to adopt dattaka putra. In case of death of an adopted son my said wife shall adopt one after another five sons in succession. If my said wife dies without adopting a son or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister Srimati Benodini Dassi who may be living at the time of my death."

On the testator's death his widow Poritoshini Dassi applied for and obtained probate of the will. The estate of Herumbo accordingly vested in her as his legal representative and remained in her possession until her death three years later. It is alleged that in August 1909 she, in pursuance of the authority given to her by her deceased husband, adopted an infant of the name of Hem Chunder Dey. This child died on the 11th of March 1910 which was followed by the death of Poritoshini herself shortly after.

The present suit was instituted on the 30th of March 1910 by Kissory Moni Dassi, the adoptive mother of Herumbo, against the two sons of Benodini Dassi, his sister, for a declaration that in the events that had happened the devise to them had failed, and that the testator's estate had devolved on her. Kissory Moni died in September following, whereupon one Trailokya Nath Ghose, who alleged himself to be the next reversioner of the infant Hem, was

(1) (1897) L. R. 24 I. A. 93 (105); I. L. R. 21 Bom. 709 (722).

(2) (1884) L. R. 11 I. A. 218; I. L. R. 11 Calc. 191.

substituted in her place. Trailokya has died since the trial ; and the present appellants are his son and widow who represent him as his executor and executrix respectively. The fact of the adoption by Poritoshini of the infant Hem was denied by the respondents, but the question has not been tried. Both the Courts in India have dealt with the case on the assumption that the adoption was duly made as alleged by the plaintiff ; and on the construction of the will have held that as the adopted son died without leaving male issue, on the death of the widow the bequest to the sons of Benodini took effect and they accordingly dismissed the suit.

The judgment of the High Court is challenged on two grounds : *firstly*, it is urged that on the adoption of the infant, the estate vested in him as full owner by virtue of the Hindu law of inheritance, that he took it in his capacity of son and not as devisee under the will, and on his death the property devolved on his heirs. Consequently, it is contended the executory devise in favour of the respondents failed completely. *Secondly*, it is contended that it fails also under the provisions of section 111 of the Indian Succession Act (X of 1865) which has been made applicable to Hindus by the Hindu Wills Act (of 1870).

It is to be observed that the will in this case does not infringe the rules which lay down the limitations on the testamentary powers of a Hindu. The bequest is to persons who were in existence at the time of the testator's death, and he does not create any estate unknown to Hindu law. Before proceeding to examine the will in order to discover the intentions of the testator, their Lordships desire to make one further observation, viz., that under the *Dayabhaga*, the testator has not only the power of authorizing his widow to adopt a son to him, and in case of the death of such adopted son, to make other adoptions in order to ensure the performance of those religious rites on which depend his salvation in after life, but he can attach to such authority a direction that her estate should not be interfered with or divested during her life, just as he can postpone the succession of his natural-born son by interposing a life estate.

In the present case had the testator given to the widow a power to adopt without constituting her his executrix she would have taken merely a widow's interest which would have become divested on her adopting a son. It is clear, however, from the language of the will that the testator was anxious that there being no natural-born son, a son should be adopted who and whose male issue should duly perform those religious rites which are considered essential

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in the Hindu system for the salvation of the deceased. With this object he empowered her to make five successive adoptions and constituted her as his executrix to give effect to his wishes. If the first son so adopted died in her lifetime without leaving male issue, she had the power to adopt a second ; or a third, fourth, or fifth in case the second, third, or fourth also died without leaving male issue. Thus the power to adopt confided to the widow could not be exhausted so long as she was alive until the directions of the testator had been fully carried out. It is obvious that the estate could pass only to the son who survived her, or, in case of his death in her lifetime, to his male issue, if he left any. Otherwise the whole object with which the power was given to the widow for making the adoptions would be defeated. The estate was in the widow during her life ; the gift over is expressly declared to take effect after her decease in case of the failure of the adoptions without securing the object the testator had in view. Their Lordships conceive that a mere statement of the purpose of the testator which is apparent on the face of the will and of the consequences resulting from the contention advanced on behalf of the appellants is sufficient to show its fallacy.

The infant who was adopted by the widow died in her lifetime unmarried and without leaving any issue, and as she died a few days later she was unable to give further effect to the wishes of her deceased husband. On her death, therefore, the gift to the sons of Benodini, the testator's sister named in the will, took effect, and the estate passed to them. But it has been strenuously contended that under the provisions of section 111 of the Indian Succession Act the bequest to them is void. That section runs as follows :—

“Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable.”

Section 111 embodies the rule enunciated in *Edwards v. Edwards*(1). The rule of construction laid down in that case has been considerably modified by later English decisions. The Indian Act, however, has given it statutory force. Even in India as regards Hindoos, its application is confined to special tracts such as the territories subject to the Lieutenant-Governor of Bengal and the Presidency towns of Bombay and Madras. Their Lordships think that it should be applied only to cases strictly coming within its

scope. In the present case the event on the occurrence of which the distribution was to take place is distinctly mentioned as being the death of the widow. That being so, the gift to the nephews is not affected by section 111 and must take effect.

Their Lordships are of opinion that the judgments of the Courts in India are correct and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

G. C. Farr.—Solicitor for the Appellants.

Watkins and Hunter.—Solicitors for the Respondent.

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Appeal dismissed.

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PRESENT: *Viscount Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.*

SETH JASWANT RAI

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.]

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November, 9, 23.

Contract—Construction—Admissibility of extrinsic evidence—Rate of payment for work done under a contract—Over-all rate, effect of.

The rate of payment for work done under a written contract to execute it is determined by the terms of the contract, and consequently extrinsic evidence as to the rate of payment allowed for such work to another contractor or to same contractor under another contract is irrelevant and inadmissible.

Under the terms of the contract in this case the schedule of rates of payment specified under one head a certain rate for carting permanent-way material and under another head the rate for carting explosives, and the note referred to in the schedule fixed conditions of carriage of cement and explosives. The question in dispute was as to the rate of payments for carting cement :

Held, that cement was permanent-way material and the rate of payment for carting cement was that specified in the schedule for carting the permanent-way material ; that the note did not fix the rate of payment, and the conditions which attached to the carriage of cement were not the same as those which attached to the carriage of explosives ; and that although both explosives and cement were to be carried under special instructions and the carriage of cement might consequently be more costly than other permanent-way materials, yet the rate of carting

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permanent-way materials was fixed as an over-all price and the fact that one article might be more costly to handle than another did not affect the rate of payment under the terms of the contract.

Appeal from a decree of the High Court at Allahabad (January 30, 1912) reversing a decree of the Court of the Subordinate Judge, Agra, (February, 4, 1910).

By an agreement dated the 15th August 1905, the appellant agreed with the respondent "to execute the undermentioned description of work in accordance with the conditions noted below in consideration of payment being made for the quantity of work executed at the rate specified in the following schedule." Their Lordships' judgment sets out the schedule and the note attached thereto. In pursuance of the contract the appellant carted, loaded and unloaded cement between August 1905 and February 1906. He was paid therefor at the rate of $1\frac{1}{2}$ pie per maund per mile, but he claimed that he was entitled to be paid at the rate of 7 pies per maund per mile. He therefore instituted the suit to recover the difference between the two rates. The evidence showed that another contractor named Malik Khushal Khan was paid for such work at the rate of $6\frac{1}{2}$ pies per maund per mile, that the appellant himself was paid at the rate of 7 pies per maund per mile for such work done in connection with another section of the same railway line that the railway authorities gave the appellant special instructions from time to time and the appellant did the work according to such instructions, that the appellant carried the cement straight through with relays of bullocks in covered carts, and that it cost him more than 4 pies per maund per mile. The Subordinate Judge was of opinion that the schedule of rates was not an exhaustive one and that the appellant should be allowed at the rate of 3 pies per maund per mile. His reasons were as follows—

"I do not think that the schedule of rates is an exhaustive one. Paragraph 1, col. 1 gives the rate for carting P. W. materials and stores by *kutchha* road. It is $1\frac{1}{2}$ pies per mile. Cement can be included in stores and explosives can also be ; if any different rate is allowed for explosives, it should be noted under paragraph 1. Explosives are noted under paragraph 2 (b). It appears from this that in *stores*, *ordinary* stores are included and not those articles for which some special precaution is to be taken. The carting of cement requires some extra precaution no doubt. The note in the agreement says that 'explosives and cement must be carried in accordance with special instructions to be given by the Executive Engineer.' The next two lines then refer to detonators. The last

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line is 'such consignments must be carried straight through with relays of bullocks in covered carts protected from the weather.' The last sentence, in my opinion, refers to *explosives* and *cements* both. *By such consignment* is meant the consignment of *explosives* and cement both, not the consignment of *explosives* alone. The Executive Engineer and the Store-keeper admit to have issued instructions from time to time to take special care in carting cement; they have always insisted on the plaintiff to have it carried in covered carts, yet the defendant would ask the Court to class cement as ordinary store and allow the rate of $1\frac{1}{2}$ pies per mile per maund for it.....

"I do not think it fair to order the plaintiff to get $1\frac{1}{2}$ pies per mile for carting cement when he has taken special care in carrying it, and when he has carried them with relays of bullocks in covered carts. The defendant has himself allowed $6\frac{2}{3}$ pies per mile to Khushal. I admit that he allowed this rate with the intention of inducing the contractor to get the work finished sooner before the rainy season set in, but at the same time I cannot find good reason to hold that he increased the rate to more than double. There is no evidence for the defence that any other contractor has done the carting of cement at $1\frac{1}{2}$ pies per mile. Had this been a fair rate, Malik Khushal would have been allowed at 3 pies per mile and not at $6\frac{2}{3}$ pies per mile.

"Taking into consideration all the facts, I think the plaintiff should be allowed at the rate of 3 pies per mile per maund for carting cement."

Both parties appealed to the High Court, which allowed the respondent's appeal and dismissed the appellant's suit with costs. The material part of the judgment was as follows :—

"If the contract provides that the plaintiff shall be paid at the rate of $1\frac{1}{2}$ pies per maund per mile, he is not entitled to be paid at any higher rate whether he has actually been put to greater expense or not. It seems to us impossible to hold that the contract treats cement as an 'explosive' and entitles the plaintiff to be paid at the rate of 7 pies per maund per mile. The contract is not very artistically drawn up, for the note, which is referred to in clause (b) in the schedule of rates, refers both to *explosives* and *cement*. The schedule taken by itself makes it quite clear that the plaintiff is not entitled to more than $1\frac{1}{2}$ pies per maund per mile for cement is included in the first item and is not an explosive. It is in the highest degree unlikely that the Railway authorities would agree to pay the same rate for carting *explosives* as for carting cement. It is specially

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provided that more than 4 maunds of dynamite shall not be carried in one cart and that detonators are to be carried separately. There is no restriction on the quantity of cement to be carried in a cart, and even the plaintiff's witnesses admit that 15 or 16 maunds of cement can be, and in fact were, carried in carts provided by the plaintiff. The only special precaution which the contractor would have to take in carting cement would be to protect the cement from the weather if cement were carried during the rainy season. The evidence shows that covers to the carts were made of 'sirki' or in some cases of tarpaulin, and in fact except for one week during Christmas there was no rain during the time the cement was carried. At the time of the contract, the parties could not have contemplated that cement would be carried in the rainy season, and it appears that most of the carting was in fact completed between November 1905 and April 1906. Upon the construction of the contract, we hold that the plaintiff is entitled to be paid at the rate of 1½ pies per maund per mile."

The plaintiff thereupon appealed to His Majesty in Council.

De Gruyther K. C. and J. M. Parikh, for the Appellant: The note should be read as a part of the schedule and when so read it shows that cement is to be carried under special instructions and conditions, and that there are no special instructions or conditions with regard to the carriage of materials falling under head 1. The appellant is therefore entitled to be paid at a higher rate. There is evidence to show that another contractor was paid 6½ pies and the appellant himself was paid 7 pies for such work in connection with another part of the same line.

(Viscount Haldane referred to *Bank of New Zealand v. Simpson* (1), and said that such extrinsic evidence was inadmissible.)

It is admitted that the actual cost to the appellant was more than 4 pies per maund per mile. It is submitted that if cement does not fall under head 2 (b), it is not provided for in the schedule and the judgment of the Subordinate Judge was therefore right. Even if cement came under head 1, the appellant was entitled to an extra payment for loading and unloading it.

Sir H. Erle Richards K. C. and O'Gorman for the Respondent, were not heard.

The judgment of their Lordships was delivered by

Lord Parmoor:—The appellant, by a contract of the 15th August 1905, agreed to execute certain descriptions of work in accordance with specified conditions and in consideration of pay-

ment being made at the rate specified in a schedule. The schedule was as follows :—

Schedule of Rates.

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Description of Work from Nagda.	Unit of Calculation. (Store Depot Site of Work.)	Rate.	Remarks.
(I)—Carting P. W. material and stores by kutchra road.	Per maund per mile.	Rs. a. p. 0 0 1½	
Loading into carts and unloading at destination.	Per maund ...	0 0 1	
(II)—(a) Haulage, portable engine.	Per ton per mile ...	0 6 0	Portable engines on their own wheels.
(b) Loading, carting, and unloading explosives (special) as per note at foot of agreement.	Seven pies per maund per mile or part of a mile.	0 0 7	See note at foot of agreement.

The note referred to in the above schedule is as follows :—

"Note for item (b) in rate column. Explosives and cement must be carried in accordance with special instructions to be given by the Executive Engineer. Detonators must not be carried along with dynamite, but in separate carts, not more than four maunds of dynamite shall be carried in one cart. Such consignments must be carried straight through with relays of bullocks in covered carts protected from the weather."

In fulfilment of his obligation under the contract, the plaintiff conveyed cement in bullock carts and claimed in respect of loading, carting, and unloading such cement, 7 pies per maund per mile or part of a mile. The Subordinate Judge held that the schedule of rates was not an exhaustive one, and that the plaintiff should be allowed at the rate of 3 pies per maund per mile for carting cement. The High Court overruled this decision, holding that the contract was clear and that the plaintiff was not entitled to be paid at a higher rate than 1½ pies per maund per mile for carting cement. Their Lordships concur in the conclusion of the High Court that the rate of payment for the carting of cement is determined by the terms of the contract and depends on the construction of the schedule of rates and the note quoted above. It follows that extrinsic

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evidence as to the rate of payment allowed for the carriage of cement to another contractor, or to the appellant under a different contract, is irrelevant, and their Lordships intimated during the hearing of the appeal that they regarded such evidence as inadmissible.

Cement is permanent-way material, and apart from the note the appellant would clearly be entitled for carting cement to a payment of $1\frac{1}{2}$ pies per maund per mile, and 1 pie per maund for loading into carts and unloading at destination. Explosives come under a different head in the column of description of work, and for loading, carting, and unloading explosives, the appellant is entitled to payment at the rate of 7 pies per maund per mile or part of a mile. The contention of the appellant is that the note places cement in the same description as explosives, and that the appellant is entitled to be paid for loading, carting, and unloading cement at the rate of 7 pies per maund per mile or part of a mile. Their Lordships cannot accept this contention. The note does not fix the rate of payment, but the conditions of carriage. The conditions which attach to the carriage of cement are not the same as those which attach to the carriage of explosives. It is true that both explosives and cement are to be carried under special instructions, and that the cartage of cement may consequently be more costly than the cartage of other permanent-way materials, but the rate of $1\frac{1}{2}$ pies per maund per mile is fixed as an over-all price, and the fact that one article may be more costly to handle than another does not affect the question of the rate of payment under the terms of the contract.

In the course of the argument it was said that if the appeal were dismissed the appellant might be deprived of his right to a payment of 1 pie per maund for loading cement into carts and unloading at destination. Their Lordships have no doubt that, so far as the work of loading the cement into carts and unloading at destination has been performed by the appellant, he is entitled to the rate of payment of 1 pie per maund, and that the appellant should not be precluded from the opportunity of substantiating any claim which may be open to him under this head. In their opinion the amount, if any, due to the appellant under this head should be settled between the parties, but unless it is so settled they reserve liberty to the appellant to apply in this suit to the subordinate Court to settle and determine the amount. Sir Erle Richards, who represented the respondents, very properly undertook on behalf of his clients not to raise any technical difficulty. Subject to the reservation of

the above liberty to apply should it be necessary, their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

E. Dalgado :—Solicitor for the Appellant.

The Solicitor, India Office :—Solicitor for the Respondent.

J. M. P.

Appeal dismissed.

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APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, K. C. Chief Justice, Sir John Woodroffe, Knight, Judge and Sir Asutosh Mookerjee, Knight, Judge.

KASSIM EBRAHIM SALEJI

v.

JOHURMULL KHEMKA.*

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November, 25.

Service of summons—Substituted service—Requirements of—Business premise—Service on outer door—Civil Procedure Code (Act V of 1908), O. 5, Rr. 12, 17, O. 9, R. 13.

Per Curiam : In a case where the defendant has not been served personally, the requirements of the rules laid down in the Code of Civil Procedure for substituted service should be strictly observed in all respects.

The mere fact that the plaintiff's attorney writes to the defendant's attorney, who acted on a previous occasion, saying "will you accept service" and he receives no reply, is not sufficient service within the meaning of O. 5, R. 12 of the Code of Civil Procedure.

Merely going to a man's place of business on three separate days—a place of business where he carries on business with other partners, and where he may or may not be on these particular days or at the particular time of the day and merely asking for him, and then when he does not find him, posting a copy of the writ on the outer door of the premises, is not sufficient service. Proper enquiries, and real and substantial effort, and not perfunctory, should be made to find out when and where the defendant is likely to be found.

Cohen v. Nursing (1) followed.

If the service of summons is not a sufficient one, it does not become sufficient by defendant's having otherwise knowledge of the institution of the suit.

Per Mookerjee J.—If the summons is not duly served, the defendant is entitled under O. 9, R. 13 of the Code of Civil Procedure to have the *ex parte* decree set aside as against him.

* Appeal from Original Order No. 17 of 1915, against the order of Mr. Justice Imam, passed on the 3rd March, 1915 on the Original Side of the High Court.

(1) (1892) I. L. R. 19 Cal. 201.

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Appeal by the Defendant.

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Suit for specific performance of an agreement.

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The suit was decreed *ex parte* on the 9th December, 1914. Then in consequence of a letter which was dated the 22nd of January, 1915 and written by the plaintiff's solicitor to the defendant, an application was made on the 17th February, 1915 to Mr. Justice Imam to set aside the decree on the ground that the writ of summons had not been served upon the defendant. That learned Judge refused to set aside the decree and this appeal was preferred against that judgment.

The judgment of Mr. Justice Imam was as follows :—

March, 3.

Imam J.—This application is for setting aside an *ex parte* decree passed in a suit that was undefended. The defendant in his sworn petition has stated that the service of summons on him had not been effected and in consequence of the deficiency of service he could not be present at the trial of the suit. The affidavits of Sitaram a servant of the plaintiff, and the bailiff are positive in their statements that the summons had been taken by the bailiff in the company of the plaintiff's servant to premises No. 1 Amratolla Street where the defendant carries on his business and on the defendant not being found in spite of search made on three consecutive days service was effected by affixing the summons at the outer door of the house. It appears that soon after the institution of the suit the plaintiff's attorney Babu Debi Prosad Khaitan communicated the fact of the institution of the suit to Mr. J. C. Dutt the attorney on behalf of the defendant in the present matter enquiring of him if he would accept service of summons on behalf of the defendant who had been his client in the matter out of which the suit had arisen. To that letter Babu Debi Prosad Khaitan received no reply, but it has been acknowledged by the assistant of Mr. J. C. Dutt that the letter was received and copy of it was forwarded to the defendant. In the petition no reference to the receipt of the letter has been made and no admission as to the knowledge of the defendant concerning the institution of the suit has been made. The petition merely refers to the fact of the passing of the decree and reading it carefully one comes to the conclusion that all reference to any knowledge concerning the institution of the suit has been advisedly avoided. On behalf of the petitioner only one ground for setting aside this *ex parte* decree has been urged and that is that the summons had not been duly served. The question resolves itself into one consideration only, namely, whether the summons had been served or not, and for

this the affidavits of Sitaram and Ishak come to furnish a sufficient answer. I see no reason to disbelieve the statement these two persons have made in their affidavits, in fact there is every indication of their truthfulness. The application is dismissed with costs.

Against this judgment, the defendant appealed.

Messrs. B. C. Mitter, S. C. Roy and C. C. Ghose for Appellant.

Messrs. H. D. Bose and K. P. Khaitan for Respondent.

The judgments of the Court were as follows :—

Sanderson, C. J.—This appeal is from an order made by Mr. Justice Hasan Imam on the 3rd of March in this year, in which he refused to set aside a decree for specific performance of an agreement between the plaintiff and defendant. The decree was made on the 9th of December 1914, and it was made *ex parte*, the defendant not being present or taking any part in the proceedings. Then in consequence of a letter which was dated the 22nd of January 1915 and written by the plaintiff's solicitor to the defendant, an application was made to Mr. Justice Imam to set aside the decree on the ground that the writ of summons had not been served upon the defendant. The learned Judge refused to set aside the decree and this is an appeal from his judgment.

Now, the service was supported in the first instance upon an affidavit in the usual form which is to be found at page 15 of the paper-book, in which one Sitaram who was employed by the plaintiff, and another, Ishak, who was in the employ of the Sheriff of Calcutta, swore that they had been to the defendant's house where he ordinarily lived and resided on the 1st, 3rd and 4th day of August, that they could not find him there, that they could not see any adult male member of his family, that they had called out his name in the usual way but got no response and that thereupon the writ had been posted upon the premises, and it was upon that affidavit of service that the learned Judge of the Court of first instance proceeded to give his decree.

Now, it turns out that the defendant did not reside at the premises which are mentioned in the affidavit, namely, No. 1 Amratolla Lane in Calcutta. What took place was that these two men whose names I have already mentioned, one in the employ of the plaintiff and the other in the employ of the Sheriff of Calcutta, went to the place where the defendant carried on business with his partner, and tried to find him there on the days in question, that the bailiff went into the business premises and saw somebody seated on a chair on each occasion, who told him that the defendant was not at that time at the place, and that then having cried aloud his name three times

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he posted the writ of summons upon the premises. The question is whether that is sufficient service. I may say at once that in one sense I regret that we have to allow this appeal, because I have not much doubt in my mind, speaking for myself, that the institution of these proceedings did come to the knowledge of the defendant, and I do not think, that the defendant has any merits in this application. But that is not the question. If we were to decide that what was done in this case was sufficient service of the writ, it might be taken as a precedent on other occasions. Inasmuch as I do not consider that what was done in this case was sufficient service, it would not be right for us to say that it was sufficient service, because we are strongly of opinion that the defendant knew of the issue of the writ. In my judgment, where it is a question of *substituted service*, and the defendant has not been served personally, it is most essential that the requirements of the *rules* should be strictly observed in all respects.

Now, the *rules* which are material to this matter have already been referred to, and I only intend to refer to them quite shortly. The first is order V, rule 12 which says, "Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient." Now, in this case there is no doubt that service upon the defendant was not made *personally*, nor was it made upon an agent empowered to accept service. It is quite true that a letter was written by the plaintiff's attorney to a gentleman who was acting in respect of the dispute about this premises on behalf of the defendant, but that does not empower him to accept service, and unless he has authority from his client to accept service, and does accept service, the mere fact that the plaintiff's attorney writes to the defendant's attorney saying 'Will you accept service,' and he receives no reply, in my opinion speaking for myself is not sufficient. Therefore, it does not come within rule 12.

The next rule which is really material is order V, rule 17.—That has already been read by Mr. Bose, but I will read it again in part for the purpose of making my judgment intelligible. It says, "—where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and

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shall then return the original to the Court."..... Now, the question in this case is whether the facts as set out in two or three affidavits which have been referred to by Mr. Bose show that the serving officer used all due and reasonable diligence. In my opinion, it would be dangerous for this Court to hold that the facts set out there show that all due and reasonable diligence was used. One must remember that the first affidavit represented that the serving officer had gone to the defendant's dwelling-house and tried to find him on three separate occasions, that he could not find him or any adult male member of the family and that he then proceeded to call out outside the house, the name of the defendant and then posted a copy of the writ upon the premises of the defendant. This is one thing. But it turns out that a very different matter occurred: The serving officer went to the defendant's place of business, where he carries on business with his partner. There is no mention in the affidavit that the defendant resides there: In fact the defendant swears that he does not ordinarily reside there; and, I am not prepared to hold that merely going to a man's place of business on three separate days,—a place of business where he carries on business with other partners, and where he may or may not be on these particular days or at the particular time of the day and merely asking for him, and then when he does not find him, posting a copy of the writ on the outer door of the premises is sufficient service. I may adopt the very excellent common sense rule laid down by one of my predecessors, Chief Justice Sir Comer Petheram. It is this: He says, "It is true that you may go to a man's house and not find him, but that is not attempting to find him. You should go to his house, make enquiries, and if necessary follow him. You should make enquiries to find out when he is likely to be at home, and go to the house at a time when he can be found. Before service like this can be effected it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found out as seems to be done in this country, to go to his house in a *perfunctory way*." I lay stress upon the words "*perfunctory way*." [See *Cohen v. Nursing Dass Auddy*(1)]. Now, those are the words used by Chief Justice Sir Comer Petheram when he was dealing with a case where service was attempted to be made on a man at his dwelling-house: I think that remark will apply *a fortiori* to this case where service was effected in a *perfunctory* manner, by going to a man's place of business where he carries on business with a partner, and where he may be or may

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not be on those days. As has been said, it is a very good rule to follow that proper enquiries, and real and substantial effort, and not *perfunctory*, should be made to find out when and where the defendant is likely to be found.

Under these circumstances I think that although as I have said before I have no sympathy with the defendant, but having regard to the fact that if we allowed this service to pass we might be approving something which would be taken as a precedent which, in my opinion, should not be taken as a precedent, I think that the appeal should be allowed and we will hear Mr. Mitter on the question of costs.

(After discussion) We think that the proper order in this case is that the appeal will be allowed upon the undertaking by Mr. Mitter that no further service of the writ will be necessary. The suit will, of course, be restored. The costs of the application before Mr. Justice Imam to set aside the decree will be costs in the cause, and each party will bear the costs of this appeal. Any costs if already paid, by the appellant will be refunded.

Woodroffe, J.—I agree that the appeal should be decreed. As there is no question in this case that the respondent did not go to the house of residence it cannot be said that all due and reasonable diligence was used to find the defendant. The fact that the plaintiff went to the house where summons was posted under the impression that it was the defendant's place of residence which it was not, indicates an intent and knowledge that the defendant was likely to be found at his place of residence, though in fact no search was made there. That the defendant had otherwise knowledge of the institution of the suit is highly probable. But that is not sufficient if the service is not formally proved.

I would like to add that the decision referred to by the Chief Justice [*Cohen v. Nursing Dass Auddy* (1)] was followed by Sir Lawrence Jenkins, C. J. and myself in an unreported decision in appeal from order No. 75 of 1912, dated the 28th November, 1913.

Mookerjee, J.—I am of opinion that the order of Mr. Justice Imam cannot be supported. The question for determination is, whether the appellant, as an applicant who seeks to set aside a decree made *ex parte* against him, has satisfied the Court, within the meaning of Rule 13, Order IX of the Code, that the summons in the suit was not duly served upon him. The answer depends upon the true construction of Rules 12 and 17 of Order V. Rule 12 recognizes the fundamental proposition that, wherever practicable,

service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service upon such agent shall be sufficient. The present case does not fall within the exception, as it is not suggested that the defendant had an agent empowered to accept service. The notice given to Mr. Dutt, who had acted as his attorney on a previous occasion, was also clearly insufficient, and reliance has not been placed thereon in support of the order under appeal. The question, consequently, arises, whether service was made in fulfilment of the requirements of rule 17. That rule—I quote only so much of it as is relevant for our present purpose—provides that where the serving officer, after using all due and reasonable diligence, cannot find the defendant, he shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain. Here the plaintiff caused the notice to be affixed on the house at 1 Amratola Lane. The plaintiff erroneously assumed that the defendant ordinarily resided there ; as a matter of fact, it was not his residence ; but in that house, business was carried on by a firm whereof the defendant was a partner. In these circumstances, can we say that the plaintiff used all due and reasonable diligence to find the defendant ; if he did not, the service in the mode in which it was effected was not in fulfilment of the requirements of the Code. In my opinion, the answer must be in the negative. I am not prepared to affirm the proposition that if the plaintiff makes no effort whatever to find the defendant in the place where he ordinarily resides, and not finding him where he carries on business along with others, affixes the summons upon a conspicuous part of the business premises, the requirements of the Code are satisfied : *Cohen v. Nursing Dass* (1). Indeed, the plaintiff has not proceeded on the theory that it was permissible under the law to serve summons in this manner. He acted on the footing that the defendant actually resided in the premises to which the summons was taken. He now discovers that he was under a misapprehension, and is consequently driven to maintain a position which is absolutely unsustainable. There is thus no escape from the conclusion that the summons was not duly served. It has finally been argued that there are ample indications that the defendant was aware of the institution of the suit against him. But this is plainly of no real assistance to the respondent ; for, if the summons was not duly served, as I hold it was not, the defendant is entitled, under order 9 rule 13, to have

(1) (1892) I. L. R. 19 Calc. 201.

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the *ex parte* decree set aside as against him. Consequently, this appeal must be allowed and the application to set aside the *ex parte* decree granted.

Mr. J. C. Dutt:—Solicitor for the Appellant.

Mr. D. P. Khaitan:—Solicitor for the Respondent.

A. T. M.

Appeal allowed.

Before Sir Lancelot Sanderson, Knight, K. C., Chief Justice, Sir John Woodroffe, Knight, Judge and Sir Asutosh Mookerjee, Knight, Judge.

LALLJEE MAHOMED

v.

DADABHAI JIVANJI GUZDAR AND ANOTHER*.

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December, 9, 10, 14.

*Principal and agent—Purchaser to be secured within a fixed time—Contract, when completed—Brokerage—Burden of proof—Duties and function of appellate Court.*

A person gave a letter signed by him to his broker in the following terms: "I agree to allow you to sell my above oil mill at Rs. 40,000 only. You will get brokerage 5 per cent. on the same when the mill will be sold through you. This condition to be in force till a fortnight (15 days) from date. On the sale proceeds being received in hand, brokerage will be paid":

*Held*, that whenever or in what way the sale was concluded, the purchaser at such sale should be secured by the broker within fifteen days of the agreement.

*Per Sanderson, C. J.*: In order to entitle an agent to receive his remuneration, he must have carried out that which he bargained to do or at any rate must have substantially done so and all conditions imposed by the contract must have been fulfilled.

That the brokerage was to be paid when the sale proceeds were received and the commission was payable if the sale proceeds were partly in cash and partly in *hundis*.

*Per Woodroffe and Mookerjee, JJ*: The *onus* of proving that the conditions of the contract were complied with, was on the plaintiff.

*Per Mookerjee, J.*: Where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not; consequently, where an agency for sale

\* Appeal from Original Decree No. 39 of 1915, against the decree of Mr. Justice Greaves sitting on the Original Side of the High Court, dated the 24th February, 1915.

has expired by express limitation, a subsequent execution thereof is invalid, unless the term has been extended.

*Per Sanderson, C. J.:* Where the matter depends to a large extent upon the verbal evidence of the witnesses, the Court of appeal should not interfere with the decision of the primary Court save on very clear grounds, in other words, unless it is clear that a miscarriage of justice has taken place.

*Per Woodroffe, J.:* If, after argument, the Court has a conviction that the judgment under appeal is erroneous, it should not be affirmed and this is not the less so because the judgment raised a question of fact.

*Per Mookerjee, J.:* The burden lies upon the appellant to satisfy the Court that the finding he assails, is not supported by the evidence on the record. When such evidence consists entirely or even principally of the oral testimony of witnesses, the appellant is at a special disadvantage.

Duties and function of appellate Court in reversing a conclusion of fact by the primary Court pointed out.

*Shunnugaroya v. Manikka* (1) and *Coghlanhan v. Cumberland* (2) referred to.

Appeal by the Defendant.

Suit by an agent against his principal for recovery of commission.

The material facts are stated in the judgment of Mr. Justice Greaves, which was as follows :

**Greaves, J.**—The plaintiff in this case claims as the assignee of one Moses Judah who was the original plaintiff in this suit but who has died since the suit was instituted, the present plaintiff having been substituted as plaintiff in his place and he claims as assignee of Moses Judah by virtue of an assignment made to him by the widow and executrix of Moses Judah, and this assignment has been duly proved before me. The claim is one for Rs. 2,000 by way of commission in the circumstances hereinafter set forth. In June 1911 the defendant Lallji Mahomed was the owner of certain oil mills known as the Lallji Oil Mills situated at Narcaldanga. In May 1911 the defendant was minded to sell these oil mills which at that time had been mortgaged by him to the Benares Bank to secure a sum of Rs. 35,000. Towards the end of May or at the beginning of June 1911 the oil mills had been advertised for sale by the defendant in the Exchange Gazette. On 13th June 1911 the defendant Lallji Mahomed gave to Moses Judah a letter in the following terms :—

"To

M. Judah Esqr.,  
Calcutta.

"Dear Sir,

"I agree to allow you to sell my above oil mills at Rs. 40,000 only you will get brokerage 5 per cent. on the same when the mill

(1) (1909) I. L. R. 32 Mad. 400 ; L. R. 36 I. A. 185. (2) (1898) 1 Ch. 704.

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*Greaves, J.*

will be sold through you. This condition to be in force till a fortnight ( 15 days ) from date." This letter was signed by the defendant and contains certain words written in Guzrati which it is proved in evidence before me were added by the defendant at the time the letter was given to Moses Judah. The Guzrati has not been translated by a Translator of this Court but the plaintiff has undertaken to have it translated and it was agreed between the parties before me that the words in Guzrati were as follows :—

"On the sale proceeds being received in hand, brokerage will be paid." As before stated, there is no dispute with regard to the letter itself or with regard to the words in Guzrati which were written thereon. The whole dispute before me really turns upon the construction of this letter. The present plaintiff contends that provided within the 15 days named in the letter he had secured a person who ultimately purchased the property for Rs. 40,000 he had fulfilled his part of the contract and was entitled to receive commission at the rate named in the letter, and that he was entitled to this commission, even if the sale was not actually completed within the 15 days. The defendant on the other hand contends that upon the true construction of the letter, the commission therein named was only payable in the event of the whole transaction being carried to completion within the 15 days named in the letter.

The facts with regard to the completion of the purchase are as follows :—The purchase was in fact completed on 27th September 1911 and upon completion the purchaser paid to the defendant Rs. 10,000 in cash and gave him Hundis for Rs. 30,000 ; subsequently a further payment of Rs. 5,000 on account of the Hundis was received by the defendant from the purchaser but no further sum was received on account of the Hundis and the Official Assignee eventually sold the property for Rs. 13,000. This amount was paid to the Benares Bank as mortgagees who also received Rs. 5,000 of the sum originally paid in cash on 27th September and it appears that there is still due to the defendant in respect of the transactions a sum of Rs. 17,000 or Rs. 18,000 including interest. In my opinion the construction put upon the letter by the plaintiff is the correct one. I think the letter means that provided Moses Judah introduced a purchaser to the defendant within 15 days and that purchaser eventually completed the purchase and paid Rs. 4,000 for the property that the plaintiff as the assignee of Moses Judah was entitled to receive the commission claimed. I have felt some difficulty with regard to the meaning of the words in Guzrati but I have come to the conclusion that the plaintiff is entitled to receive the

sum claimed even although the whole sum of Rs. 40,000 was not received in cash by the defendant. The defendant chose to trust the purchaser introduced by Moses Judah to the extent of the Hundis given by that purchaser and in my opinion that agreement between the purchaser and the defendant cannot affect the rights of the present plaintiff or those through whom he claims unless the words in Guzrati meant that the commission was only payable if the whole sum of Rs. 40,000 was received in cash, and in my opinion the words in Guzrati do not bear that interpretation. Various authorities were quoted to me in the course of the argument and they are summed up at Halsbury's Laws of England, Vol. I pp. 194, para 413, and the statement therein contained is borne out by the case upon which the statement is based. That paragraph runs as follows :—

"In order to entitle an agent to receive his remuneration, he must have carried out that which he bargained to do or at any rate must have substantially done so and all conditions imposed by the contract must have been fulfilled. He is not however deprived of his right to remuneration when he has done all he undertook to do by the fact that transaction has not been beneficial to the principal or that it has subsequently fallen through, whether by some act or default of the principal or otherwise unless there is a provision in the contract, express or implied to that effect or unless the agent was himself the cause of his services being abortive." In my opinion there is no provision in the contract express or implied preventing the agent from receiving his remuneration under the circumstances of this case.

The issues that were raised before me were as follows :—(1) Whether the sale of the defendant's Oil Mills to Bhatuknath was effected through the instrumentality of Moses Judah. Bhatuknath was called as a witness before me and stated in his evidence that it was through Moses Judah the mills were purchased. He says "Moses Judah introduced me to the defendant in respect of the purchase. Price etc. was settled through Judah" and later on in his evidence in answer to question put in cross-examination he states that Judah was the defendant's broker in transaction. He says "Judah introduced me to Lallji Mahomed. I am speaking the truth. It was Moses Judah who introduced me to the defendant. It was Judah, through whom the price was settled and it was Judah who got me into trouble," meaning by this, that he paid an excessive price. When the purchase was completed commission at the rate of  $\frac{1}{2}$  per cent. was paid to Bhatuknath, although he states that he never

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received this sum and it was urged before me that this fact shows that Judah could not have acted as broker in the transaction or Bhatuknath would not have claimed this commission. I cannot accept that contention. It very often happens that a purchaser is anxious to get some rebate of the purchase price and I think that is what the transaction amounts to. It was also urged before me that in the letters of the 25th and 26th July and 7th and 8th August which are exhibits in this case, no mention was made of Judah but in my opinion it was necessary that any mention should be made of him in these letters and that cannot affect my decision in the case. I, therefore, decide the 1st issue in favour of the plaintiff and hold that the sale of the defendant's Oil Mills to Bhatuknath was effected through the instrumentality of Moses Judah Issac. (2) was as follows:—Whether upon the true construction of the letter of 13th June the plaintiff is entitled to the commission claimed in the plaint. For the reasons above given, I think he was. The 3rd issue dealt with a point of law namely whether the executrix of Moses Judah could make a valid transfer under section 130 of the Transfer of Property Act. It was argued before me that inasmuch as the suit was commenced by Moses Judah himself and the assignment was made afterwards, a suit for the commission does not fall within the terms of section 6(e), of the Transfer of Property Act, and that it was not an actionable claim within the meaning of section 130. In my opinion, it was. It was not a mere claim for damages but a claim for a definite and ascertained sum. I have now dealt with all the matters that were raised before me and I accordingly give judgment for the plaintiff for the payment to him by the defendant of the sum claimed, namely, Rs. 2,000 together with costs of the suit on scale No. 2. Interest on judgment at 6 per cent. per annum.

*Mr. S. Ghose.*—Under Hechle's Rules and Orders of this Court, Ch. XXXVI, R. 58. (p. 371) the fees for instructing only one counsel will be allowed unless there is a special direction from ~~your~~ Lordship to the contrary. I ask for that direction.

*The Court.*—No, fees for only one counsel should be allowed. No interest ought to be paid on the amount but there will be interest on decree at 6 per cent. per annum until realization.

Against this judgment, the defendant appealed.

*Messrs. S. Mookerjee and S. K. Roy* for the Appellant.

*Messrs. Langford James and S. Ghosh* for the Respondents.

The judgments of the Court were as follows :

*Sanderson C. J.*—In this case the plaintiff, as assignee, claims

Rs. 2000 which is alleged to have been due by way of commission to Moses Judah who has died since the suit was instituted.

The defendant being the owner of certain oil mills was anxious to sell them: They were mortgaged to a Bank for Rs. 35,000, and at the end of May or the beginning of June 1911, the mills were advertised for sale in the Exchange Gazette. On the 13th June 1911, the defendant gave Moses Judah a letter in the following terms and signed by the defendant, "I agree to allow you to sell my above Oil Mill at rupees forty thousand only. You will get brokerage 5 per cent. on the same when the Mill will be sold through you. This condition to be in force till a fortnight (15 days) from date". Then there were certain words which, it was agreed between the parties, were added at the time that letter was written, in Guzrati, and the correct translation was in these terms, "On the sale proceeds being received in hand, brokerage will be paid."

The first question is as to the meaning of the letter. To my mind, the meaning is pretty plain: In order to earn his brokerage Moses Judah was to introduce a purchaser who would be willing to give Rs. 40,000. He had the opportunity of introducing such a purchaser and thus qualifying for his brokerage, for 15 days only. I do not think that the letter means that the sale had to be completed within 15 days, but it was essential for Moses Judah, if he was to earn his commission, that he was to introduce within 15 days a person who would be ready and willing to purchase for Rs. 40,000: In other words, if he did so introduce a purchaser, the mere fact that the purchase was not completed until September would not deprive the broker of his commission.

Now, there is no question as to the law which governs such a matter as this. In my judgment, it is correctly stated by Mr. Justice Greaves at the bottom of page 75 of the paper-book. There he says, quoting from Lord Halsbury's Laws of England, "In order to entitle an agent to receive his remuneration, he must have carried out that which he bargained to do or at any rate must have substantially done so and all conditions imposed by the contract must have been fulfilled."

The main question, therefore, in this case is whether M. Judah antially carried out what he had bargained to do. This is a question of fact mainly dependent upon the evidence of the witnesses. The case was evidently tried with great care, and the learned Judge reserved his judgment: After due consideration he has accepted the evidence of Bhatuknath the purchaser and rejected that of the defendant: and, in a case such as this, where the

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matter depends to a large extent upon the verbal evidence of the witnesses, in my judgment, this Court ought not to interfere with the decision of the learned Judge save on very clear ground; in other words, unless it is clear that a miscarriage of justice has taken place. The Judge who tried the case has had the advantage, which we have not had, of seeing and hearing the witnesses an advantage which in my experience it is almost impossible to over-estimate. In this case I am not prepared to say that the learned Judge has decided wrongly; on the contrary I think there is sufficient evidence to justify the decision at which he arrived. On the material points he has accepted the evidence of Bhatuknath and rejected that of the defendant: and, in passing, I may say that the comments made upon the evidence of the defendant by the learned counsel for the plaintiff were not without justification. Bhatuknath's evidence was to the effect that it was Moses Judah who introduced him to the defendant, and his evidence on one point is very significant: he says he did not want to pay more than Rs. 35,000, but he was persuaded by Moses Judah to offer Rs. 40,000 which was the price eventually agreed upon: Some of the passages in his evidence are at pages 36 and 37 of the paper-book; as for instance, where he says in cross-examination

Q. "Do you say it was Judah who introduced you to Lallji Mahomed?"

A. "Yes, that is true."

Q. "You wanted to pay Rs. 35,000 not 40,000."

A. "Yes, that is true, I first offered Rs. 35,000 and Judah used to come and see me often and he got me into this scrape." Then he is asked what is the scrape. "A. What could I do, I did not. I am telling you the truth, it was Judah who introduced me to the defendant; it was Judah through whom every thing was settled in respect of this matter, and it was Judah who got me into this trouble." "The trouble is this:—I was made to agree to pay Rs. 40,000 for the Mill it was not worth Rs. 13,000" ... "I did not want to buy it, but Judah persuaded me to take it. He introduced me to the defendant, pressed me to take it, and at last got me into this trouble." That being so, the plaintiff's case is proved on one of the material points, namely, that it was through the instrumentality of Moses Judah that the purchase price, Rs. 40,000 was obtained. But it is said that there is nothing to show that Moses Judah introduced the purchaser and performed his part of the contract within the specified time, 15 days. In my judgment, if Bhatuknath's evidence is accepted, as it was by the learned Judge, that it was through Moses Judah that he was per-

sued to offer Rs. 40,000, there is evidence that this must have been done within the time limit, because we find that on the 26th June, 13 days from the date of the broker's letter, Bhatuknath wrote to the defendant in the following terms, "As per our conversation with your Mr. Lallji Mahomed we intend to purchase the above Mills together with the land connected with it at a cost price of Rs. 35,000 on the following condition." Then he set out the condition: The letter closed as "The alternative arrangement for payment is as follows:—" Rs. 10,000 in cash at the time of sale. Rs. 30,000 to be paid after one year," containing an offer, though it was an alternative offer, of Rs. 40,000 which he said he would never have made but for the instrumentality of Moses Judah. He must have seen the defendant that day, and such letter contains an offer of Rs. 40,000. It is true that the payment of part was to be deferred for one year, but that offer was the one which with a slight variation of the terms was eventually accepted in August. Consequently, Bhatuknath's evidence having been accepted by the learned Judge the performance of the contract by Moses Judah was within the time.

I am aware that the letters in the case provide matter of comment on Bhatuknath's evidence, as for instance, the letter of the 25th of June refers to his having seen the advertisement in the Exchange Gazette. This is a legitimate comment, but it is not conclusive that Moses Judah did not introduce the purchaser. The matter had been advertised and it was quite possible that it was Moses Judah who brought the advertisement to the attention of the purchaser in the first instance. Again, the receipt for Rs. 200 where the payment is stated to be "Brokerage" is a legitimate subject of comment, but I think the learned Judge's remarks on that transaction are not unreasonable, and, in any event, as between vendor and purchaser, the use of the word "Brokerage" is quite unsuitable, whatever the nature of the transaction was. The main reason, however, which weighs with me is that the learned Judge has had to deal with conflicting verbal evidence on a question of fact; and after seeing and hearing the witnesses he has come to the conclusion that the truth lies on the side of Bhatuknath and not on the side of the defendant: and, in such a case, in my judgment, this Court should not interfere, unless it is clear that he has come to a wrong conclusion. This I am not prepared to say.

A further point has been raised, namely, that the plaintiff in any event cannot recover more than the commission on the amount actually received by the defendant in cash. In my judgment, this is

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not correct. The brokerage was to be paid when the "sale proceeds" were received. The purchase was completed on the 27th of September 1911, when the purchaser paid Rs. 10,000 in cash and gave Hundis for Rs. 30,000. I agree with the learned Judge that the words in Guzrati added to the letter of the 13th June, 1911 do not mean that the commission was only to be payable if and when the whole Rs. 40,000 were received in cash; and, if the defendant chose to agree with the purchaser that the "sale proceeds" should be partly cash and partly Hundis, I do not think that can affect the plaintiff's right to commission.

In my judgment this appeal should be dismissed.

**Woodroffe, J.**—The plaintiffs as the assignees of one Judah sue to recover commission alleged to be due to him under a written agreement dated 13th June 1911 for having effected through his agency the sale of certain oil mills. It must be shewn that the conditions of the contract have been complied with. The onus of proving this is on the plaintiffs. This is of importance in the present case for in regard to the particular question on which I mainly rest my judgment, viz., whether it has been shewn that Judah obtained the purchaser within fifteen days of and in terms of the agreement it has been argued by Mr. Langford James for the respondent that this was not at issue in the lower Court. There is no finding on this particular point. It was however not necessary to put this specifically in issue since the onus of proving all facts necessary to establish the claim was on the plaintiffs and the defendant put in issue the allegation that the purchase was effected by Judah in terms of the agreement according to the conditions of which alone he was entitled to a commission.

Several questions arise upon the construction of the agreement, it has been argued for the respondent that it is sufficient if a purchaser was secured within 15 days even if the actual purchase was completed later. This the appellant denies contending that commission was payable only in the event of the transaction being completed (which it was not) within 15 days: and nextly that brokerage was only payable on the sale proceeds being received in cash (which was not the case) within this period.

The appellant's contention is not without force on both these grounds but it is not necessary to go into this matter for whatever be the true construction of the document on these points it is clear and is indeed conceded that whenever or in what way the sale was concluded the purchaser at such sale must have been secured by the broker within 15 days of the agreement; Now the agreement was

dated the 13th June 1911 and admittedly the first proved date at which vendor and purchaser were in communication was the 25th June, when twelve days under the agreement had already run by. It must be shown then that within the remaining three days Judah found the purchaser. Has this been shewn? In cross-examination the purchaser was asked whether his letter of the 25th June was written before or after his introduction to the defendant and whether Judah asked him to write to the defendant or not. He was again asked about this matter in re-examination and he replied that he did not remember the date nor even the month when Judah spoke to him about this letter and that he could not say whether it was before or after this letter that Judah spoke to him. Had it been the fact that it was due to Judah's intervention that the first letter was written it does not seem to me possible that the witness could have forgotten it. His answer must have been in that case that he must have seen Judah first for before seeing him he had known nothing of the defendant or of his property. He will not commit himself to this and I think for the reason that he had not then seen Judah but had learnt about the property through an advertisement in the Gazette. This is indicated by the words in the letter of the 25th, "I see in the Exchange Gazette that you are going to sell." The purchaser also in his evidence says, "I saw the Exchange Gazette and then I wrote that letter," not that he had seen Judah meanwhile or at all. Though the omission of Judah's name from the letter may not be conclusive it is certainly evidence against the plaintiffs for a reference to the broker through whom it is suggested that the purchaser came to know of the property might have been expected. There is no specific evidence that Judah secured the purchaser between the 26th and 28th or the conclusion of the period allowed to him. There is some general evidence that he introduced the purchaser which in any case is scarcely accurate if the first communication of the 25th to which I have referred was without his intervention. The evidence however is not such as I can accept. Doubtless, in a case of this kind great weight must be attached to the judgment of the learned Judge who heard the case; but, in the present instance, we have no finding on the specific point and the uncorroborated evidence of the purchaser on which the learned Judge has relied is, upon the most favourable view, consistent with the fact of work done after the limited period and is in my opinion in conflict with and unsupported by the documentary evidence in the case and the inferences to be derived therefrom. As stated, the first letter of the 25th indicates that it was the advertisement which first put the parties in communication.

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There is no mention of Judah as broker in any of the letters until we get to the letter of 15th November 1911 which is of doubtful admissibility against the appellant. But on the merits the letter comes too late to be of value and is open to the suspicion that evidence was then being made for the claim by Judah which followed it in January.

It is remarkable also that there is no letter or other document by the broker which establishes his claim. Had he earned his commission in terms of the agreement, I think he would have been careful to put it on record. The solicitor Mr. E. O. Moses who acted in the sale as attorney for the vendor states that he never heard that Judah was the broker in the transaction. The purchaser also in his evidence says he never mentioned the matter to any one. Finally, there is evidence that the purchaser Bhatuknath took a commission of  $\frac{1}{2}$  per cent., on the entire sale proceeds of Rs. 40,000 on the ground that there had been no broker in the sale. He further granted a receipt for the same on which express reference is made to "Amount of brokerage." The purchaser knows some English and though asked to give an explanation of this circumstance was unable to do so. Mr. Justice Greaves has held that this was a rebate, an explanation which the witness himself has not ventured to give. But, assuming that it was, the point is that it was allowed because no broker had been employed. If so, then this directly contradicts the purchaser witness when he says that Judah was to his knowledge the broker. Nor is it likely that the defendant would have agreed to make a further payment for "brokerage" if he was already indebted for considerable brokerage to Judah. For these reasons, I would allow this appeal. It is possible that what may have happened is that the defendant advertised his property and then Judah coming in this way to know of it got the agreement of agency from the defendant. After that, and independently of Judah, the purchaser learnt from the Gazette that the property was for sale and entered into communication with the vendor. Judah, who may have heard of this, may, sometime between June and August (for it is to be observed that the sale was not concluded till the latter date) have pressed the purchaser to buy in the hopes of putting forward a claim for commission. But this would not be sufficient. It is, however, not necessary for me to hold any thing more than that the plaintiffs have not established that Judah earned his commission within the terms of the agreement, and, I would, therefore, decree this appeal with costs and dismiss this suit with costs. As regards the question whether we should interfere in

appeal with questions of fact. I will only say this that if after argument the Court has a conviction that the judgment under appeal is erroneous it should not be affirmed and this is not the less so because the judgment raised a question of fact. The mode in which the conviction is brought about in matters of law and fact is a question into which I do not enter, it being sufficient in the present case to say that in my opinion the appellant has shown us circumstances under which the judgment under appeal should be reversed.

**Mookerjee J.**—This is an appeal by the defendant in an action by an agent against his principal for recovery of commission. The defendant employed the plaintiff to sell his oil mill; the agreement was made on the 13th June, 1911, and was embodied in a letter in the following terms: "I agree to allow you to sell my above oil mill at Rs. 40,000 only; you will get brokerage 5 per cent. on the same, when the mill will be sold through you; this condition in force till fortnight (15 days) from this date." There was a postscript to the effect that "on the sale proceeds being received in hand brokerage will be paid." On the 25th June, 1911, one Batuknath Boodhnath wrote to the defendant: "I see in the Exchange Gazette that you (are) going to sell your oil mill at Narikeldanga. I went thrice to your office, but unfortunately could not find you there. I shall, however, call at your oil mill to-morrow, with an expert Engineer's opinion, and will give you offer for the same. I may buy for myself or sell to my friends." On the next day, the intending purchaser again wrote to the defendant. The letter referred to a conversation which the writer had with the defendant and contained two alternative offers. The first alternative was the purchase of the mill for Rs. 35,000 cash, Rs. 1,000 to be deposited thereout as earnest money, and the balance to be paid after one month, if on trial working meanwhile, the mill turned out to be satisfactory. The second alternative was the purchase of the mill on payment of Rs. 10,000 in cash at the time of sale, and Rs. 30,000 to be paid after one year. It may be observed parenthetically that neither of these offers accorded with what the seller expected, namely, Rs. 40,000 in cash. What followed does not transpire from the correspondence, but we find that on the 8th August, 1911, the purchaser wrote to the defendant and confirmed an arrangement made on the day previous for the sale of the mill for Rs. 40,000; Rs. 10,000 to be paid in cash on registration of the conveyance, Rs. 20,000 by a Hundi payable one year after that date, and the balance of Rs. 10,000 by another Hundi payable 18 months after the date of the registration of the conveyance.

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On the 15th November 1911, nearly two months after the sale had been completed on the 27th September, the purchaser is said to have written a letter to the plaintiff and authorised him to negotiate for the appointment of managing agents of the mill, which is described as "purchased through you." On the 26th January, 1912, the solicitors of the plaintiff wrote to the defendant and demanded immediate payment of Rs. 2,000 as brokerage due on the sale of the mill, which was alleged to have been effected through their client. The solicitor of the defendant promptly replied on the next day. He pointed out that the letter of authority of the 13th June, 1911, was limited to 15 days from the date thereof. He asserted that the plaintiff had failed to secure a purchaser within the prescribed time and that the mill had been sold without any concern with him; and he added that the seller had already paid brokerage on the transaction. This referred to a payment of Rs. 200 by the defendant to the purchaser, who had granted a receipt therefor as paid on account of brokerage. The plaintiff thereupon instituted this suit on the 13th June, 1912. The defendant asserted that the sale had taken place without the intervention of the plaintiff as broker and repudiated the claim as entirely unfounded. Mr. Justice Greaves has held on the evidence that the sale was effected through the instrumentality of the plaintiff and has decreed the suit. On the present appeal, the defendant has contended that this finding is not supported by the evidence on the record, and that even if the finding is maintained it is not sufficient to justify the decree.

It is an elementary principle that where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not; consequently, where an agency for sale has expired by express limitation, a subsequent execution thereof is invalid, unless the term has been extended. It is thus plain that the plaintiff could be entitled to the commission, only if he found a purchaser on or before the 28th June, 1911. I do not hold that the plaintiff was bound to complete the transaction within this period; in my view of the contract, the plaintiff would be entitled to the commission, if, within the time prescribed, he produced a person able, ready and willing to enter into the transaction with the defendant on the terms prescribed by the latter, and the plaintiff must within that period notify his principal that he had secured such a person. It is also indisputable, I think, that the burden lies upon the plaintiff to establish that he has earned the commission he claims. If these principles are borne in mind, there is no escape from the conclusion

that the plaintiff cannot be awarded a decree, merely on the finding that the sale was effected through his instrumentality. If the case were before a Jury, the Court would have to instruct them that to find a verdict for plaintiff, they must find that plaintiff procured a purchaser, able and willing to buy on the terms stated in the writing, that he notified defendant of the fact and that this was done within the 15 days prescribed. The vital question, consequently, is did the plaintiff bring the purchaser to the defendant on or before the 28th June, 1911. There is no trace in the correspondence already summarised that he had done so. The first letter of the purchaser to the defendant mentions that he had learnt from the Exchange Gazette about the proposed sale of the mill. This, no doubt, is not conclusive proof that he had not met the broker on or before the 25th June; but there is no specific evidence upon which I can act that the two had met before that date. The letter of the 26th June also, taken by itself, does not assist the plaintiff. No doubt, it recites a conversation between the defendant and the purchaser, but it does not show that the plaintiff was present at that interview. I do not overlook that the purchaser asserts that he was introduced to the defendant by the broker, and his version has been accepted as true by Mr. Justice Greaves; but this does not carry matters far enough. The purchaser could not pledge his oath that his first letter was written after the broker had informed him of the proposed sale of the mill. I am not unmindful that the purchaser asserts that he first offered Rs. 35,000 and that the broker Judah used to come and see him often and got him into the scrape, that is, induced him to pay Rs. 40,000. This statement, even if accepted and taken along with the letter of the 26th June, does not conclusively prove that Judah introduced the purchaser to the defendant on or before the 26th. There can be no dispute that if such introduction did not take place on or before the 26th June, the evidence does not show that it was brought about either on the 27th or 28th June; indeed, the evidence is entirely silent with regard to these two dates.

Mr. Langford James, in the course of his able argument for the respondent, properly emphasised the fact that Mr. Justice Greaves, who had the opportunity to see the witnesses, which we have not, has believed the purchaser in preference to the defendant; and he has argued that in a case of this description, where there is a conflict of oral testimony, the Court of appeal should not reverse the finding of the primary Court. This contention raises a question of considerable importance as to the duty and

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functions of a Court of Appeal in this country. As was stated by White, J. in *Protap Chunder v. Empress* (1) and by Trevelyan, J. in *Milan Khan v. Sagai Bepari* (2), the sound rule to apply in trying an appeal in a civil case is that the Court must be convinced, before reversing a finding of fact by a lower Court, that the finding is wrong; in other words, the burden lies upon the appellant to satisfy the Court that the finding he assails is not supported by the evidence on the record: *Wise v. Sunduloonissa* (3); *Tahboonissa v. Shamkishore* (4); *Shetaldee v. Molamdee* (5); *Gopee Nath v. Boddhummut* (6); *Anund v. Rutnessur* (7); *Nobin v. Bungo* (8); *Hoymobutty v. Sreekishen* (9); *Munsoob v. Ali* (10). When such evidence consists entirely or even principally of the oral testimony of witnesses, the appellant is at a special disadvantage. Reference may in this connection be made to the observation of Lord Collins in *Shanmuga v. Manikya* (11): "No doubt, it is always difficult for Judges who have not seen and heard the witnesses to refuse to adopt the conclusions of fact of those who have; but that difficulty is greatly aggravated where the Judge who heard them has formed the opinion, not only that their inferences are unsound on the balance of probability against their story, but they are not witnesses of truth." The reasons for this rule of practice are too obvious to require elucidation. But it is worthy of note that Lord Collins refers with approval to the judgment delivered by Lindley, M. R. in the Court of Appeal in the case of *Coghlanhan v. Cumberland* (12), which sets out the limitations of the rule: "even where the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must re-consider the materials before the Judge, with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it, if, on full consideration, the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the

(1) (1882) 11 C. L. R. 25.

(2) (1895) I. L. R. 23 Calc. 347.

(3) (1867) 11 M. I. A. 177 (181); 7 W. R. P. C. 13.

(4) (1871) 15 W. R. 228.

(5) (1875) 25 W. R. 30.

(6) (1875) 25 W. R. 26.

(7) (1875) 25 W. R. 50.

(8) (1876) 25 W. R. 363.

(9) (1870) 14 W. R. 58.

(10) (1872) 17 W. R. 358.

(11) (1909) L. R. 36 I. A. 185; I. L. R. 32 Mad. 400.

(12) (1898) 1 Ch. 704.

Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is and must be guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge even on a question of fact turning on the credibility of witnesses whom the Court has not seen." In the case in which these observations were made, the Court of Appeal (Lindley, M. R., Rigby L. J. and Collins, L. J.) allowed the appeal, although the appeal turned on a question of fact. It is obviously impossible to frame a formula, to define the impression which must be produced on the minds of the Judges of the Court of Appeal, so that they may not shrink, in the words of Lindley, M.R. from overruling the judgment of the trial Court; and the cases in the books employ various expressions which are really of little assistance, such as that the judgment is 'clearly wrong' [*Khoorshedjee v. Mehrwanjee* (1)], that the decision is 'irresistibly erroneous', *Gray v. Turnbull* (2), followed in *Pandurang v. Anant* (3), in *Bai Gulabbai v. Sri Datgarji* (4), that 'a Court of Appeal ought never to reverse the judgment of an inferior Court unless quite confident that the judgment given in the Court below is wrong' [*Bandon v. Becker* (5)], followed in *Yemunabai v. Ba'shet* (6),] that the Court will not reverse the decision 'except in cases of extreme and overwhelming pressure' [*The "Julia"* (7); *The Alice* (8)] that 'a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony' [*Kho Sit v. Lien Thean* (9)] or that the finding 'is so clearly against the weight of the testimony as to amount to a manifest defeat of justice': *The Gairloch* (10). We may also bear in mind the observation of Lord Chelmsford in *Tayammaul v. Sasha-challa* (11); "the advantage the Judge of the primary Court possesses in forming a correct opinion of the credit due to the

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(1) (1837) 1 M. I. A. 431 (442); 5 W. R. P. C. 57.

(2) (1876) L. R. 2 H. L. Sc. 53.

(4) (1907) 9 Bom. L. R. 393.

(6) (1903) 5 Bom. L. R. 584.

(8) (1868) L. R. 2 P. C. 245.

(10) (1899) 2 I. R. 1 (18).

(3) (1903) 5 Bom. L. R. 956.

(5) (1835) 3 Cl. &amp; F. 479 (512).

(7) (1860) 14 Moo. P. C. 210.

(9) (1912) App. Cas. 323.

(11) (1865) 10 M. I. A. 429 (436).



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witnesses, does not relieve the Court of Appeal from the duty of examining the whole evidence and forming for itself an opinion upon the whole case." To the same effect are the observations of Baggallay, J. A. in *the Glannibanta* (1). Indeed, if the conclusion of the trial Court in a case of conflict of oral testimony were held practically unassailable, that Court would in essence be constituted the final Court on questions of fact. But the parties to the cause, are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of appeal, though, as James, L.J., said in *Bigby v. Dickinson* (2), "if we are to accept as final the decision of the Court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened." The matter is obviously simpler where the conclusion is merely an inference of fact [Lord Blackburn in *Smith v. Chadwick* (3)] or where the evidence whereon the decision of the trial Judge is based, has been taken on commission [Lord Collins in *Imdad v. Pateshri* (4)]. But, even in other cases, it is undoubtedly the duty of the Court of Appeal to weigh conflicting evidence and to draw its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. Cases are by no means rare where an Indian appellate Court has reversed the decision of the primary Court based on conflicting oral testimony and the conclusion of the appellate Court has been ultimately affirmed by the Judicial Committee: *Rashmohini v. Umeschandra* (5); *Gangamoyi v. Trailuckhya Nath* (6); *Bulli Kunwar v. Bhagirathi* (7); *Chotey Narain v. Ratan Koer* (8); *Secretary of State v. I. G. S. N. Co.* (9); *Jeolal Makto v. Loknaryan* (10) (decided by the Judicial Committee on the 23rd January 1912). I am not unmindful that there are other instances where the Judicial Committee has reversed the decision of the local appellate Court and restored the decree of the trial Judge; but that has been done because their Lordships were satisfied, upon a scrutiny of the entire evidence, that the view of the latter was more consistent therewith than that of the former: *Romesh Chunder*

(1) (1876) 1 P. D. 283 (287).

(2) (1876) 4 Ch. D. 24 (29).

(3) (1884) 9 App. Cas. 187 (194).

(4) (1910) 14 C. W. N. 843; 12 Bom. L. R. 419.

(5) (1898) L. R. 25 I. A. 109; I. L. R. 25 Calc. 824.

(6) (1905) I. L. R. 33 Calc. 537; 3 C. L. J. 349.

(7) (1905) 9 C. W. N. 649.

(8) (1894) I. L. R. 22 Calc. 519; L. R. 22 I. A. 12.

(9) (1909) I. L. R. 36 Calc. 967.

(10). Unreported. Decided by the Judicial Committee on the 23rd January, 1912.

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v. *Rajani Kant* (1); *Sajid Ali v. Ibad Ali* (2); *Shyama Charn v. Khetromoni* (3); *Khoo Sit v. Lien Thean* (4); *Nawab Shah Ara v. Nanhi Begam* (5). We may also bear in mind the fact that although as an ordinary rule the Judicial Committee does not interfere with concurrent judgments of the Courts below, on question of fact, instances are by no means rare where their Lordships have examined the whole evidence, formed for themselves an opinion on the entire case and reversed the unanimous decision of the two Courts in India on a question of fact: *Rungama v. Atchama* (6); *Huradhun v. Muthoranath* (7); *Mudhoo Soodun v. Suroop Chunder* (8); *Tayammaul v. Sashachalla* (9); *Guthrie v. Abool Mozuffer* (10); *Lekraj v. Mahtab Chand* (11); *Hay v. Gordon* (12); *Venkateswara v. Shekhari* (13); *Shekh Muhammad v. Zubaida* (14); *Bishun Chand v. Bijoy Singh* (15). It is not necessary for the present purpose to consider whether any general principle is deducible from the expressions used by their Lordships as to the circumstances under which they will depart from the rule ordinarily observed by them, such as 'that the very clearest proof is shown that the decision is erroneous,' that 'the Board is clearly satisfied that there has been miscarriage in the appreciation of evidence,' that 'it is manifestly clear from the probabilities that the Court below was wrong,' that 'the case is very extraordinary,' that 'a strong case must be made out before the Board would recommend reversal,' that 'it must very clearly appear that the conclusion is very plainly erroneous,' that 'there has been some miscarriage in respect of a presumption to which too much weight was given,' that 'very definite and explicit grounds must be assigned for interference,' that 'there is so strong a preponderance of testimony that the Board can confidently pronounce the decision to be wrong,' and other expressions of like import. But it is obvious that if reversal

(1) (1893) I. L. R. 21 Calc. 1.

(2) (1895) I. L. R. 23 Calc. 1.

(3) (1899) I. L. R. 27 Calc. 521; L. R. 27 I. A. 10.

(4) (1912) App. Cas. 323.

(5) (1906) 11 C. W. N. 130.

(6) (1846) 4 M. I. A. 1; 7 W. R. P. C. 57.

(7) (1849) 4 M. I. A. 414; 7 W. R. P. C. 71.

(8) (1849) 4 M. I. A. 431; 7 W. R. P. C. 73.

(9) (1865) 10 M. I. A. 429.

(10) (1871) 14 M. I. A. 53; 15 W. R. P. C. 50; 7 B. L. R. 630.

(11) (1871) 14 M. I. A. 393; 17 W. R. 117; 10 B. L. R. 35.

(12) (1872) L. R. I. A. Sup. Vol. 106; 10 B. L. R. 301; 18 W. R. 480.

(13) (1881) L. R. 8 I. A. 143; I. L. R. 5 Mad. 384.

(14) (1889) L. R. 16 I. A. 205; I. L. R. 11 All. 460.

(15) (1911) 15 C. W. N. 648; 13 C. L. J. 588.

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of concurrent findings of fact is permissible, the Court of first appeal should not be deemed fettered to a larger extent.

In the present case, as I have already stated, the finding that the sale was effected through the instrumentality of the plaintiff does not justify a decree in his favour. The purchaser does not make an explicit statement that the plaintiff introduced him to the defendant on or before the 28th June 1911, but even if this much be deemed to be implied in his statements, I cannot accept his testimony. The correspondence does not show any trace of the presence of Judah in the negotiations; one would have expected some mention of his name in the first or the second letter. It is also remarkable that no written communication appears to have passed between the plaintiff and the defendant, although the plaintiff had taken the precaution to accept the agency by a written instrument. There is further the unexplained fact that the purchaser received Rs. 200 as brokerage, he cannot explain why the sum was described by this obviously inappropriate term; it is extremely improbable that the defendant would have made a present of this sum to the purchaser, if he had really to pay Rs. 2,000 to the plaintiff as broker. There is the further significant fact that the claim for brokerage was not put forward till the 26th January, 1912, though, if the plaintiff is to be believed, he had earned it before the 26th June, 1911 and the sale had been actually completed on the 27th September, 1911. Finally, the case for the plaintiff is certainly not improved by the letter alleged to have been written on the 15th November, 1911, which plainly bears the appearance of an attempt to create evidence for future use. After the most careful and anxious consideration of the entire evidence on the record and the circumstances of the case, I have arrived at the conclusion that the plaintiff has failed to establish that he has earned the commission claimed in terms of the contract and that the decree in his favour cannot be supported. In my opinion, the appeal should be allowed and the suit dismissed with costs throughout.

**Sanderson, C. J.**—The result is that, in view of the opinion expressed by the majority of the Court this appeal will be allowed, the judgment of the Court of first instance set aside, and the plaintiff's suit dismissed with costs both of the Court of first instance and of this appeal.

A. T. M.

*Appeal allowed.*

*Babu Suresh Ch. Mookerjee* :—Attorney for the appellant.

*Babu Charu Chunder Bose* :—Attorney for the respondent.

## APPELLATE CIVIL.

*Before Sir Asutosh Mukherjee, Knight, Judge, and Mr. Justice  
N. R. Chatterjee.*

\*GANES DUTT SINGH AND OTHERS.

v.

LACHMI NARAIN SINGH AND OTHERS.\*

*Rent, enhancement of—Improvement by landlord—Bengal Tenancy Act (VIII of 1885), Sec. 29, Provisos (1), (2), Sec. 30 (c)—Sum in addition of interest—Damages, claim for.*

Section 3 of the Evidence Act lays down a rule of common sense. It expresses the rule in terms which allow full effects to be given to circumstances or conditions of probability or improbability.

*Boisogomoff v. Nahapiet Jute Company (1)*; and *Jarat Kumari v. Bissessur (a)* referred to.

The requirements of the first clause of the proviso to section 29 of the Bengal Tenancy Act are fulfilled if two elements are proved, namely, *first*, that there was an agreement to pay rent which is higher than the previous rate, and, *secondly*, that rent has been paid at a higher rate.

The enhancement of rent claimed for improvement under clause (c) of section 30 of the Bengal Tenancy Act should include a sum in addition to the interest payable upon the capital spent.

The tenants agreeing to pay certain rent per bigha in consideration of the improvement, may be taken *prima facie* as their own estimate of what would be fair under section 30 clause (c) of the Bengal Tenancy Act; and the Court might well adopt this as the basis for a decree, till, at any rate, the tenants showed that their estimate was erroneous.

Where improvement has been effected, an agreement for enhancement of rent at more than two annas in the rupee is valid. But this enhanced rent can continue only so long as the improvement exists and substantially produces its estimated effect in respect of the holding.

The claim for damages in this case was negatived.

Appeals by the plaintiffs Landlords and Defendants Tenants.

Suit for recovery of arrears of rent.

The material facts and arguments appear from the judgment.

*Sir Rash Behary Ghose, Babus Umakali Mukherjee, Kulkarni Sahay and Sivanandan Roy* for the Appellant.

*Babus Narendranath Mitter and Abani Bhushan Mukherjee* for the Respondents.

The judgment of the Court was delivered by

**Mookerjee J.**—This is an appeal by the plaintiffs in a suit for recovery of arrears of rent due for the years

\* Appeals from Appellate Decrees Nos. 3629 to 3635 of 1912, 580 of 1913, and 3595 to 3598, 3600, 3601 and 3603 of 1912, against the decrees of F. R. Roe Esq., District Judge of Bankipore, dated the 18th May, 1912, modifying those of Babu Kamala Prasad, Munsiff of Patna, dated the 12th March, 1910.

(1) (1902) I. L. R. 29 Calc. 323; 6 C. W. N. 495.

(2) (1911) I. L. R. 39 Calc. 245.

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1313 to 1316 (F.S.) The case for the plaintiffs is that the holding in question was originally Bhowli, that about the year 1889, the rent was commuted into *nagdi* at the rate of Rs. 5 a year and that rent was realised at that rate up to the year 1897 when the tenants agreed to pay rent at the enhanced rate of Rs. 6-8 in consideration of an improvement to be effected by the landlords. The improvement in question was a channel through which surplus water might flow out of the land. The plaintiffs assert that the improvement was effected at their expense and that the tenants have enjoyed the benefit thereof. The plaintiffs further allege that rent was paid by the tenants at the rate of Rs. 6-8 per bigha till quite recently, when there was a fresh agreement to pay rent at the enhanced rate of Rs. 9 per bigha in consideration of an improvement in the channel. The defendants deny all the allegations of the plaintiffs. They also deny the character of the tenancy and contend that rent was never paid even at the rate of Rs. 5 per bigha. They allege further that there was no agreement to pay rent at the rate of Rs. 6-8 on account of the improvement mentioned, much less was there a subsequent agreement to enhance the rent to Rs. 9. They finally contend that if there was an agreement for enhancement of rent, it was illegal as made in contravention of section 29 of the Bengal Tenancy Act. The Court of first instance gave the plaintiffs a modified decree, which was confirmed on appeal by the District Judge. The case was then brought in second appeal to this Court and was remanded. This Court directed the District Judge, to find whether the contract for enhancement of rent was valid and operative under section 29 of the Bengal Tenancy Act, and, if it was not so operative, to determine, to what extent the rent should be enhanced under section 30 (c) of the Bengal Tenancy Act. This remand was based on two findings contained in the judgment of the District judge; namely, first, that there was an agreement to pay rent at the rate of Rs. 6-8 in consideration of the improvement to be effected by the landlords; and secondly, that the improvement in question had been made at the cost of the landlords and the benefit thereof had been enjoyed by the tenants. After remand, the District judge has held, *first*, that the contract for enhancement of rent was invalid under section 29 of the Bengal Tenancy Act. *Secondly*, that the plaintiffs were entitled to rent at the rate of Rs. 5-10 per bigha under section 30 (c) of the Bengal Tenancy Act. He has accordingly modified the decree by the primary Court and has also allowed the plaintiffs damages upon the sum decreed in their favour. The plaintiffs have appealed against

this decree. The defendants also have appealed on the ground that no enhancement should have been allowed and that no decree for damages should have been made. The appeals by the plaintiffs raise two substantial questions ; first, is the contract for enhancement of rent valid under section 29 of the Bengal Tenancy Act; and, secondly, if it is not valid, what is the enhanced rent which should be decreed to the plaintiffs under section 30 (c) of the Bengal Tenancy Act.

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As regards the first question, there is now no controversy that the tenants did agree to pay enhanced rent in consideration of improvements to be effected by the landlords at their expense, that the improvements have been made and that the tenants have enjoyed the benefit thereof. But as this agreement for enhancement was not in writing and registered, as required by clause (a) of section 29, the question arises, whether the plaintiffs have brought themselves within clause (1) of the proviso to that section. Clause (1) of sec. 29 provides that the money rent of an occupancy raiyat may be enhanced by contract, subject to the condition that the contract must be in writing and registered. To this is added the proviso that nothing in the section shall prevent a landlord from recovering rent at the rate at which it has been actually paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed. Before the District Judge, it was argued that in all human probability the tenants paid rent at the enhanced rate of Rs. 6-8 a bigha, as contemplated by the first clause of the proviso. The considerations urged in support of the argument are set out in the judgment of the District Judge and may be recapitulated here. If there was an agreement to pay rent at the rate of Rs. 6-8 and if the improvements in question were effected by the landlords at their expense and enjoyed by the tenants, is it at all probable that the landlords should have from 1304 to 1312 accepted rent at the lower rate. No suit for rent was previously brought; rent had been amicably settled and it was difficult to understand why the landlords should have, during all these years, contented themselves with the smaller rent after they had invested capital on the works of improvement in consideration of which the tenants agreed to pay a higher rent. The District Judge concedes that these considerations show that in all human probability the defendants had paid a sum higher than Rs. 5 per bigha from 1304 to 1312. But he declined to draw the inference that the rent had been paid at the enhanced contract rate, because, in his opinion, it was absolutely impossible to say

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what the sum paid was. In another passage in his judgment, he states that although the tenants agreed to pay Rs. 6-8 per bigha, if the landlords would improve the irrigation in the village, they did not in fact pay the whole of that amount, and the landlords, rather than fight the whole body of tenants, were glad to accept any addition to the previous rent which they were willing to give. In our opinion, the treatment of the case by District Judge involves two errors of law, namely, first, he has applied a test of proof other than that embodied in section 3 of the Indian Evidence Act; and secondly, he has not correctly appreciated the requirements of the first clause of the proviso to section 29 of the Bengal Tenancy Act.

As regards the first point, we must bear in mind that section 3 of the Indian Evidence Act lays down that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The effect of this section has been considered in two recent cases; namely, *Boisogomoff v. Nahapiet Jute Company* (1) and *Jarat Kumari Dassi v. Bissessur Dutt* (2). In the second of these cases, Jenkins C. J. pointed out that the materials on which Courts have to pronounce are necessarily imperfect; for apart from the inherent uncertainty of human affairs, the presentment of them to a tribunal is ordinarily the outcome of faulty observation, defective memory, inaccurate description and natural bias, and even that is blurred sometimes by the intervention of interpretation. Demonstration or a conclusion at all points logical cannot be expected, nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable. The Evidence Act consequently expresses the rule in terms which allow full effect to be given to circumstances or conditions of probability or improbability. To the same effect is the observation of Banerjee J. in the case first mentioned; that section 3 only lays down a rule of common sense. The judgment of the District Judge in this case shows that he has tested the evidence as if the Indian Evidence Act only provided that a fact is said to be proved when after considering the matter before it the Court believed it to exist. It has been overlooked that a fact is also said to be proved when the Court considers its existence so probable that a prudent man, ought, under

(1) (1902) I. L. R. 29 Calc. 323; 6 C. W. N. 495.

(2) (1911) I. L. R. 39 Calc. 245.

the circumstances of the particular case, to act upon the supposition that it exists. The District Judge has very forcibly set out the circumstances which, in his opinion, show that, in all human probability, the tenants paid rent at a rate higher than Rs. 5. He should consequently have held that the fact in question has been proved.

As regards the second point, the District Judge has apparently held that the case cannot be brought within the first clause of the proviso to section 29, unless it is proved that the whole of the amount payable at the enhanced rate has been actually realised by the landlords from the tenants. That clearly is not the intention of the Act. If two elements are proved, namely, first, that there was an agreement to pay rent at Rs. 6-8 which is higher than the previous rate of Rs. 5 a bigha ; and secondly, that rent has been paid at a higher rate than Rs. 5, the inference follows that the requirements of the section have been fulfilled. In these circumstances, we must hold, upon the facts found in the judgment of the District Judge, that the contract for enhancement of rent from Rs. 5 to Rs. 6-8 is operative between the parties.

As regards the second question, namely, the enhancement of rent under section 30 (c), we may state that in the view we take of the first question, it is not necessary for us to deal with it in detail. But we may add that the judgment of the District Judge is assailable in second appeal even in respect of that matter. The District Judge has held that the costs of the improvement by the landlord was Rs. 5 per bigha, and has, on this ground, allowed the plaintiffs a decree at the enhanced rate of Rs. 5-10 per bigha. He has not stated explicitly the process of reasoning which led him to this conclusion. But it has been suggested—and the suggestion seems plausible—that he has added the 10 annas as fair interest on the sum spent by the landlords to carry out the improvement. This ignores the fact that the landlords would be entitled to rent at the enhanced rate only so long as the improvement might last, and, that, a time must come when the rent would have to be reduced to the original tenant. The consequence would be that if the landlord were allowed nothing beyond fair interest on the capital invested for the purpose of the improvement, his capital would be lost to him after the lapse of a few years. Consequently, the enhancement should include a sum in addition to the interest payable upon the capital spent. Then, again, as the tenants agreed to pay Rs. 6-8 a bigha, in consideration of the improvement, that may be taken, *prima facie*, as their own estimate of what would be fair rent under section 30 (c) ; and the Court might well adopt this as the basis for a decree, till, at any rate, the tenants

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showed that their estimate was erroneous. But, as we have said, it is not necessary for us to develop this aspect of the case, because the plaintiffs are entitled to rent at the contract rate of Rs. 6-8 per bigha for the years mentioned.

Attention may here be drawn to the effect of the second clause of the proviso to section 29, which makes clause (d), (whereby the amount of enhancement is limited to two annas in the rupee on the rent previously payable), applicable only to cases where no improvement has been effected by the landlord at his expense. Where, as here, such improvement has been effected, an agreement for enhancement of rent at more than two annas in the rupee is valid. But this enhanced rent can continue only so long as the improvement exists and substantially produces its estimated effect in respect of the holding. Thus, although, we allow the plaintiffs to realise rent from the defendants at the enhanced rate for the years in suit, in any subsequent suit for rent, it would be open to the tenants to establish, if possible, that rent should not be decreed at the enhanced rate, because the improvement either no longer exists or does not substantially produce the estimated effect in respect of the holding. It is obviously just that if the improvement has ceased to exist in part only, there should be a corresponding reduction in the enhanced rent.

As regards the appeals by the tenants, we are of opinion that this is a case where damages should not be decreed. There has obviously been a long standing dispute between the parties, and if the tenants have failed to pay rent regularly, they alone cannot be held responsible; the landlords, on their part, put forward a claim for enhanced rent at the rate of Rs. 9 and that case has completely broken down.

The result is that this appeal is allowed and the decree of the District Judge varied. There will be a decree in favour of the plaintiffs for rent in respect of the years in suit, at the rate of Rs. 6-8 per bigha. The rent in arrears will carry interest at Rs. 12-8 per cent. per annum up to the date of the institution of the suit. The amount decreed will carry interest at 6 per cent per annum. The parties will pay their own costs throughout the litigation.

This judgment will govern S. A. Nos. 3630, 3631, 3632, 3633, 3634, 3635 of 1912 and 580 of 1913, preferred by the landlords, as also S. A. Nos. 3595, 3596, 3597, 3598, 3600, 3601, and 3603 of 1912 preferred by the tenants. In each case, the appeal will be allowed and a modified decree drawn up as above.

A. T. M.

*Appeals allowed.*

*Before Mr. Justice Fletcher and Mr. Justice Roc.*

SURENDRA NARAYAN MITRA

v.

DIJENDRA PROSAD MITRA AND OTHERS. \*

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*Civil Procedure Code (Act V of 1908), Order XX. r. 12, scope of—Mesne-profits, assessment of—Previous decision, if bars a suit by a pro forma defendant for mesne-profits for subsequent period.*

Order XX, rule 12 of the Code of Civil Procedure does not contemplate anything except the relation between the plaintiff and the defendant in the suit, and there is nothing to suggest that it applies between co-defendants.

A decision, therefore, passed in a proceeding under order XX. rule 12 of the Code as regards the assessment of mesne-profits cannot bar a subsequent suit by a *pro forma* defendant (in the previous suit) for recovering damages in respect of the period subsequent to the assessment of damages in the former suit.

Appeal by the Plaintiff.

Plaintiff obtained a lease of certain lands from the defendants Nos. 57 to 60, and when he attempted to take possession of the said lands he was resisted by the defendants Nos. 1 to 56. Defendants Nos. 57 to 60 thereupon instituted a suit against the defendants Nos. 1 to 56, to recover possession through the plaintiff of the lands together with mesne-profits. Plaintiff was made a *pro-forma* defendant to that suit. The suit was decreed on the 11th July, 1902, and actual possession was delivered on the 23rd July, 1909. In the course of the execution proceedings in that suit mesne-profits were assessed for three years down to 11th July, 1905. Plaintiff brought the present suit against the defendants for recovery of mesne-profits or damages in respect of the same lands for the period subsequent to the assessment of damages in the former suit.

The defence of the contesting defendants was that the suit was barred by the rule of *res judicata* and by the provisions of section 211 of the old Code of Civil Procedure (corresponding to Order XX, rule 12 of the new Code of 1908).

The Courts below gave effect to the contention of the defendants, and dismissed the suit.

Against the decision of the lower appellate Court the plaintiff appealed to the High Court.

\* Appeal from Appellate Decree No. 3899 of 1912, against the decree of H. C. Liddel, Esq. District Judge of Jessore, dated the 21st September 1912, affirming that of Babu Tarak Nath Dutt, Subordinate Judge, 1st Court, of Jessore dated the 30th May, 1911.

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*Babus Sarat Chandra Roy Chaudhury and Dharendra Krihna Roy* for the Appellant.

*Babus Bepin Behary Ghose, Jnanendra Nath Sirkar and Amarendra Nath Bose* for the Respondents.

The judgment of the Court was delivered by

**Fletcher, J.**—This is an appeal from a decision of the learned District Judge of Jessore affirming the decision of the Subordinate Judge of the first Court there. The plaintiff brought the suit to recover mesne-profits or damages in respect of certain lands of which he had been kept out of possession by the defendants Nos. 1 to 56. The plaintiff in the year 1896 obtained a lease of about 600 Bighas of land at an annual rent of Rs 196 odd from the defendants Nos. 57 to 60. When the plaintiff attempted to take possession he was resisted by the defendants Nos. 1 to 56. Then happened what has caused the difficulty in the present suit. In the year 1900, the defendants Nos. 57 to 60 instituted a suit to recover possession through the plaintiff of the lands together with mesne-profits. The present plaintiff was the pro forma defendant to that suit. But it is quite clear that that suit ought to have been dismissed because either the defendants Nos. 57 to 60 had a right to possess the lands in which case the decree ought to have been in their favour or that there had been a right of possession in favour of the present plaintiff in which case the suit ought to have been dismissed. What happened was that the suit was decreed on the 11th July, 1902, actual possession being delivered on the 23rd July, 1909. In the course of the execution proceedings in that suit, mesne profits were assessed for three years down to the 11th July, 1905 and now the plaintiff brings the present suit to recover mesne-profits after that date. The learned Judges of the Courts below have dismissed the suit on the ground that it is barred by the rule of *res judicata*. It is quite clear that section 11, Code of Civil Procedure contemplates a case where a party derives title from a party to the previous litigation subsequent to the previous litigation. There is nothing in section 11 to suggest that where the plaintiff has derived no title subsequent to the previous suit, the subsequent suit should involve the usual consequence of being dismissed. That is what has caused the difficulty in the present case because obviously the plaintiff in this suit does not claim through the defendants Nos. 57 to 60 subsequent to the date of the former suit.

Then the next point is that, at any rate, the present plaintiff was a formal party to the former suit and that a case of *res judicata* has

arisen between the present plaintiff and the defendants Nos. 1 to 56 by reason thereof. But no issue was raised or tried between the present plaintiff and the defendants Nos. 1 to 56 in the former suit. It is quite clear, therefore, that the present claim is not barred by section 11 C. P. C.

The other point is that the plaintiff's suit is barred by section 211 of the old Code of Civil Procedure which corresponds with Order XX, rule 12 of the new Code. But order XX, rule 12 does not contemplate any thing except the relation between the plaintiff and the defendant in that suit. There is nothing in order XX, rule 12 to suggest that it applies between co-defendants. That being so, there is nothing to prevent the plaintiff in the present suit from recovering damages in respect of the period subsequent to the assessment of damages in the former suit. The present appeal must, therefore, be allowed with costs both here and in the Courts below and the case remitted to the Court of first instance for the purpose of deciding the other issues raised in the case and, if necessary, for assessing and determining the amount of damages payable to the plaintiff.

A. N. R. C.

*Appeal allowed.*

*Before Mr. Justice Woodroffe and Mr. Justice Coxe.*

THE EASTERN MORTGAGE & AGENCY COMPANY, LTD.

v.

PREMANANDA SAHA AND OTHERS. \*

*Receiver, removal of—Order refusing removal—Appeal, if lies—Joint receivers—Retirement of one, effect of.*

No appeal lies against an order refusing to remove a receiver who has already been appointed.

Where two persons were appointed joint receivers to an estate, the retirement of one of them would not make the order appointing the receivers come to an end, and the estate would not be without a receiver and without the protection for which a receiver is, in fact, appointed.

Appeal by the Plaintiffs, the Eastern mortgage and Agency Company Limited.

The plaintiffs brought two suits against Mati Lal Das and another,

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\* Appeals from Original Orders Nos. 314 and 315 of 1914 (with Civil Rules Nos. 702 and 703 of 1914), against the orders of B. L. Chatterjee, Esq., Subordinate Judge, 1st Court, at Dacca, dated the 6th of June, 1914.

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in the Court of the 1st Subordinate Judge at Dacca, for recovery of large sums of money due on two mortgage bonds. On the application of the plaintiffs for the appointment of a receiver of the mortgaged properties during the pendency of the suits, the Court ordered both the parties to nominate a receiver. The plaintiffs nominated their own agent at Barisal, Mr. T. C. Tweedie, and the defendants nominated Babu Premananda Shaha, Sheristadar, District Judge's Court, Dacca, as receiver. The Court, in order to safeguard the interests of both the parties, appointed both these gentlemen as joint receivers to the mortgaged properties. For various reasons, however, the receivers could not work smoothly together. Mr. Tweedie, thereupon, submitted a petition before the Court with a view to get his co-receiver removed on the ground amongst others that he was ignorant of zemindary business, and also stated that if his wishes were not given effect to, he would himself retire. The plaintiffs also filed a petition for removal of Babu Premananda Shaha on various grounds, and for appointment of Mr. Tweedie as sole receiver. The defendant Mati Lal Das also filed a petition requesting the Court to accept Mr. Tweedie's resignation and to appoint Babu Premananda Shaha as sole receiver. Babu Premananda Shaha also filed a written statement answering all the charges brought against him. The Court, after hearing all the parties, accepted the resignation of Mr. Tweedie, and directed the plaintiffs to nominate another receiver in his place to work jointly with Babu Premananda Shaha, whom he refused to remove.

Against that order appeals were preferred to the High Court by the plaintiffs; and as they entertained doubts as to the maintainability of the appeals, they also made applications for revision, and obtained the Rules.

*Mr. C. R. Das, Babus Provas Chandra Mitra and Ambica-Pada Chaudhury* for the Appellants.

*Mr. Langford James, Babus Gopal Chandra Das and Satis Chandra Chowdhury* for the Respondents.

The judgment of the Court was delivered by

August, 6.

Woodroffe, J.—I am of opinion that the preliminary objection that no appeal lies in this matter succeeds. This is not a case of an application for appointment of a receiver or of a refusal to appoint a receiver. In substance it is one for the removal of a receiver who has already been appointed. Therefore I think that no appeal lies. But as the case has been argued at some length I shall deal with some other points which have been raised.

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The Court was of opinion that in the interest of the estate two receivers should be appointed so that the interest of both the mortgagor and the mortgagee might be represented. Each of the parties was allowed to nominate. The plaintiffs nominated Mr. Tweedie and the defendants nominated Premananda Saha who is a Court officer, a Sheristadar. Our attention has been drawn to the decision in *Mohini Mohan Patra v. Ram Narain Patra* (1) in which an opinion was expressed that it was not expedient to appoint a Court officer as a receiver. But we are not concerned here with that question for we have not to consider an application for the appointment of any Court officer as a receiver, but we have to determine whether any appeal lies upon an application to remove a person who is a Court officer from being a receiver.

It appears clearly that the order for appointment of the receiver was not by consent. It also appears that for some time the joint receivers worked together without any (at any rate overt) quarrel. Later disputes arose between them which appear to have been due to several causes. Some of which have been drawn to our attention by Mr. James. One cause of ill-feeling appears to have arisen out of the question as to whether or not Mr. Tweedie should retain for himself what is described as a personal *nazar* or whether it should be credited to the estate. Babu Premananda Shaha very properly thought that this *nazar* should be credited to the estate.

Another point to be noted in this connection is that Mr. Tweedie while leaving India had purported to appoint a substitute to act for him and the Judge did not, and I think rightly, accept Mr. Tweedie's substitute. On Mr. Tweedie's return he found that his substitute had not been appointed and that his co-receiver had received the commissions for the work done, as was right seeing that the work had been done by Babu Premananda Saha alone. Following on these disputes in which the right appears to have been with Babu Premananda Shaha, an application was made by Mr. Tweedie with a view to get his co-receiver removed on the ground amongst others that he was ignorant of zemindary business. Mr. Tweedie also stated that if his wishes were not given effect to he would himself retire. This he subsequently did.

It has been contended before us by learned counsel on behalf of the appellant that on the retirement of Mr. Tweedie, the order appointing the receivers came to an end. For such a proposition no authority of any kind has been cited. It would be indeed dangerous to hold that if two persons are appointed as receivers and one were

(1) (1911) 14 C. L. J. 445.

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(to give an example) to suddenly die that there the estate would be without a receiver and without the protection for which a receiver is, in fact, appointed.

Moreover, our attention has been drawn to an order passed by the Subordinate Judge on the 4th July, 1914, which states that Mr. Tweedie was a receiver until the date when his resignation was accepted. It further directs that the sole receiver Premananda should submit accounts for the period subsequent to that and until the appointment of another joint receiver. The appellants appear to have refused to nominate any person to represent them as a receiver in the place of Mr. Tweedie who had retired.

It has also been objected that even if these contentions with which we have dealt, are not made out the objection which has been raised against the continuance of the Sheristadar as receiver has not been investigated. These objections appear to me rather to have come from Mr. Tweedie for the personal reasons stated than from the company in whose name he purports to act. But it is quite clear and this is made out in the 19th paragraph of the affidavit of Premananda that the objection which was put forward in the name of the company were fully considered by the Court as also was the written answer of Premananda which was put up before the Judge.

On these grounds I hold that there is no appeal or a case before us for revision. The appeals therefore fail and are dismissed with costs. We assess the hearing fee at five gold mohurs in each case.

The rules are discharged.

A. N. R. C.

*Appeals dismissed: Rules discharged.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and  
Mr. Justice Newbould.*

MOTILAL RADHAKISSEN

v.

GANPATRAM AND OTHERS.\*

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August, 5.

*Adjudication order, annulling of—Applicant, what to prove—Provincial Insolvency Act ( III of 1907 ), Secs. 27, 42, Sub-sec. ( 1 ).*

Section 42 of the Provincial Insolvency Act is moulded on section 35 of Statute 45 and 46 Vict., Chap. 52.

\*Appeal from Original Order No. 224 of 1915, against an order of N. K. Dutt Esq., District Judge of Monghyr, dated the 1st May, 1915.

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An order for annulment of adjudication can be made only upon proof of the existence of one or more of the circumstances specified in sub-section (1) of section 42 of the Provincial Insolvency Act.

It is obligatory upon an applicant under section 42 of the said Act to establish the existence of one or more of the circumstances mentioned therein.

Under section 27 of the Provincial Insolvency Act, consent of all the creditors is not by itself necessarily sufficient to justify an order of annulment.

*Quere* : Whether, if one or more of the circumstances mentioned in sub-section (1) of section 42 were proved to exist, the Court could, under the Indian law, as under the English law (where the phraseology is slightly different), refuse to make an order of annulment.

### Appeal by the Creditor.

Application for annulment of adjudication order by the insolvents, the respondents.

The material facts and arguments appear from the judgment.

*Messrs C. C. Ghose, K. P. Khaitan and Babu Jogendra Narain Mojumdar* for the Appellant.

*Babu Surendra Nath Ghosal* for the Respondents.

The Judgment of the Court was delivered by

**Mookerjee, J.**—This appeal is directed against what purports to be an order under sub-section (1) of section 42 of the Provincial Insolvency Act, whereby an order of adjudication has been annulled. The respondents applied on the 24th July, 1912 to be adjudicated insolvents under the provisions of the Provincial Insolvency Act. The order of adjudication was made in due course under section 16 on the 12th August, 1912. Since then, a receiver has been appointed and has taken charge of the assets. Proceedings were thereafter instituted under section 43 on the allegation that the insolvents had misconducted themselves in the manner contemplated in that section. Pressed by these proceedings, the insolvent repeatedly applied under section 42 to have the adjudication annulled. The application was refused on more than one occasion, but was ultimately granted on the 1st May, 1915. The present appeal by one of the creditors is directed against that order and is supported on the ground that none of the circumstances, enumerated in section 42 as essential for an order of annulment, has been established. In our opinion, there is no answer to this objection.

Sub-section (1) of section 42 authorises the Court to annul an adjudication of insolvency when the Court is satisfied that the debtor should not have been adjudged an insolvent or where it is proved to the satisfaction of the Court that the debts of the

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insolvents have been paid in full or where a composition or a scheme has been approved by the Court under section 27. There is no foundation for any possible suggestion here that the respondents should not have been adjudged insolvents. They were adjudged insolvents on their own application, and they cannot, with any show of reason, now turn round and contend that the order was improperly obtained. It is also clear that the debts of the insolvents have not been paid in full; in fact, in their petition for annulment, the respondents state that they will endeavour hereafter to satisfy the claims of their creditors. The only question then is, whether a composition or scheme has been approved by the Court under section 27. There is no trace on the record of an order of the Court, which can, by any stretch of language, be deemed to express its approval of a composition or a scheme. Indeed, an examination of the proceedings shows conclusively that the preliminary steps requisite for an order under section 27 have not yet been initiated. The position, consequently, is that not one of the three circumstances mentioned in section 42, which would justify an exercise of the power vested in the Court to annul an adjudication of insolvency, exists in the present case. An earnest appeal has, however, been made by the respondents to induce us to hold that the failure of the receiver to satisfy the debts up to the present time, justifies the order of the Court below. The obvious answer is that an order for annulment of adjudication can be made only upon proof of the existence of one or more of the circumstances specified in sub-section (1) of section 42. That section is moulded on section 35 of Statute 45 and 46 Vict. Chap. 52; with reference to the latter provision, it has been ruled that the Court has no power to annul otherwise than in exercise of the authority vested in it by the Statute: *Re Gyll, ex parte Board of Trade* (1); *Re Hester* (2) and *Re Painter* (3). It may be incidentally noted that a contrary view had been taken and wider powers claimed for the Court under the Statute of 1869 by Bacon C. J. in the case of *ex parte Ashworth re. Hoare* (4). We have then the fundamental position that it is obligatory upon an applicant under section 42 to establish the existence of one or more of the circumstances mentioned therein; this has not been done here. It may be a matter for consideration whether, if one or more of these circumstances were proved to exist, the Court could, under the Indian law, as under the English law, refuse to make an

(1) (1888) 5 Mor. 272.

(2) (1889) 22 Q. B. D. 632.

(3) (1895) 1 Q. B. D. 85.

(4) (1874) L. R. 18 Eq. 705.

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order of annulment; there is apparently an important variation here from English law, for whereas section 42 of the Provincial Insolvency Act uses the word "*shall*", section 35 of the Bankruptcy Act, 1883, uses the word "*may*", and it was with reference to the latter phraseology that Stirling L. J. said in *Re. Keet* (1), that the jurisdiction is discretionary, and, that it would not, in the absence of special circumstances, be a good exercise of discretion to make an order of annulment, where, if the bankrupt were applying for his order of discharge, an order of discharge would not be granted: *Re. Taylor* (2); *Re. Beer* (3). But it is perfectly plain that, even under section 27 of the Provincial Insolvency Act, the consent of all the creditors is not by itself necessarily sufficient to justify an order of annulment. In the case of *In re Hester* (4), Lord Esher M. R. said: "The cases are clear that the Court is not bound by the consent of all the creditors. Although the consent of all the creditors has been obtained, the Court will still consider whether what they have agreed to is for the benefit of the creditors as a whole. The Court has gone still further, and I think rightly so, and has said that under the present Bankruptcy Act, it will consider not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large; and they will take into consideration the position of the bankrupt with regard to his creditors, and see whether what is proposed will not place his future creditors, who must come into existence immediately, in a position of imminent danger." Bowen L. J. was equally emphatic and observed: "When the creditors have not been paid in full and there are no objections to the original validity of the receiving order, it is not enough for the debtor to collect the assents of his creditors and come to the Court and say, rescind the receiving order. He ought, if he wishes to move the Court to interfere in a matter which, to a certain extent, is one of discretion, to bring before it some clear grounds for thinking that what is proposed is a *bona fide* proposal, which it is in the interest of the creditors to uphold. I wish emphatically to add my entire concurrence in what the Master of the Rolls has said that the proposal ought to be also one which is not detrimental to the interests of the public. These interests are part of what the Court has to consider upon such application under the present Bankruptcy Act." Fry L. J. added: "It is an idle notion that the Court is bound by the consents of the

(1) (1885) 2 K. B. 666.

(2) (1901) 1 K. B. 744.

(3) (1903) 1 K. B. 623.

(4) (1832) 22 Q. B. D. 632.

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creditors. The Court has far larger and more important duties to perform than merely to consider whether the creditors have consented to the rescinding of the order. We are bound, in the exercise of our jurisdiction in such a matter, and, I think, I might almost say, in all matters under this Act, to take a wider view. We are not only bound to regard the interests of the creditors themselves, who are sometimes careless of their best interests, but we have a duty with regard to the commercial morality of the country." To the same effect are the decisions in *Re Gyll Ex parte Board of Trade* (1) and *In re Flatau Ex parte Official Receiver* (2). It is consequently fruitless for the respondents to rely, as they have done, upon the fact that the appellant, at one stage, was willing to accept a composition, and to have the matter settled out of Court.

The result is that this appeal is allowed, and the order of the Court below set aside. The appellants are entitled to their costs in both the Courts out of the estate of the insolvents. We assess the hearing-fee in this Court at five gold mohurs.

A. T. M.

*Appeal allowed.*

(1) (1888) 5 Mor. 272.

(2) (1893) 2 Q. B. 219.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.*

SHER JAN KHAN AND ANOTHER

v.

ALIMUDDI AND ANOTHER.\*

CIVIL.

1915.

May, 26,  
July, 13

*Damages, suit for—Principal and agent—Unauthorised fraudulent act of agent—Master's benefit—Illegal attachment and sale of movable property.*

*Per Curiam* : Acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent, even though it is not for his benefit and even though he did not in fact authorise the commission of the fraudulent act.

English and American cases referred to.

X and Y obtained a decree for money against four brothers A, B, C and D. The decree-holders applied for execution against D alone by attachment and sale of his movables. The warrant of attachment was issued in due course, but the peon, on the identification of P, the agent of the decree-holders, attached three heads of cattle which belonged to B. B protested and tendered the decretal amount, but the peon, who was in collusion with P, had the cattles sold for an insignificant sum. P acted in this manner on account of ill-feeling which he bore towards the judgment-debtors. In a suit for damages by the judgment-debtor against the decree-holders :

*Held*, that the attachment and sale of movable property were illegal.

That the decree-holders were liable for damages for the fraudulent conduct of their agent.

Appeal by the Defendants.

Suit for recovery of damages for illegal attachment and sale of movable property in execution of a decree for money.

The material facts and arguments appear from the judgment.

*Babu Abinas Chandra Guha* for the Appellants.

*Babu Asita Ranjan Chatterjee* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

**Mookerjee, J** :—This is an appeal by the defendants in an action for recovery of damages for illegal attachment and sale of movable property in execution of a decree for money. The facts found by the Courts below lie in a narrow compass. Two persons who may be called X and Y obtained a decree for money against four brothers A, B, C and D. The decree-holders applied for

July 13.

\* Appeal from Appellate Decree No. 1468 of 1913, against the decree of Babu Rames Chunder Sen, Subordinate Judge of Backergunge, dated the 31st January, 1913, affirming that of Babu Jadu Nath Mojumdar, Munsif of Barisal, dated the 26th June, 1912.

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execution against D alone by attachment and sale of his movables. The warrant of attachment was issued in due course, but the peon, on the identification of P, the agent of the decree-holders, attached three heads of cattle which belonged to B. B protested and tendered the decretal amount, but the peon, who was in collusion with P, had the cattles sold for an insignificant sum. It has been established that P acted in this manner on account of ill-feeling which he bore towards the judgment-debtors. The judgment-debtors claimed damages from the decree-holders on account of illegal attachment and sale. The Courts below have concurrently decreed the suit. It cannot be disputed that the attachment was illegal; when execution had been taken out against D alone, the property of B could not be attached; besides, when the judgment-debtors offered to satisfy the decretal debt, their property could not be lawfully sold. It is obvious, consequently, that there was illegal attachment and sale of the movable property of the plaintiff. The sole question in controversy is, whether the defendants are liable for the fraudulent conduct of their agent, who, in collusion with the peon, has fraudulently brought about this result. The Courts below have answered this question in the affirmative.

There can be no doubt that both upon principle and authority this view should be sustained.

It has not been disputed that under the law of England, a principal is liable for the fraud of his agent acting within the scope of his authority whether the fraud is committed for the benefit of the principal or for the benefit of the agent. This is definitively laid down by the House of Lords in *Lloyd v. Grace* (1), which overrules the dicta to the contrary by Lord Bowen in *British M. B. Co. v. Charnwood Railway Co.* (2), and by Lord Davey in *Rubens v. Great Fingull* (3). But it has been argued on behalf of the appellants that a contrary rule was enunciated in *Barwick v. English Joint Stock Bank* (4), and was adopted by the Judicial Committee in *Burma Trading Corporation v. Mirza Mahomed Ali* (5). There is no foundation, however, for this contention. In the first place, as explained by the House of Lords in *Lloyd v. Grace* (1), the decision in *Barwick v. English Joint Stock Bank* (4), is not an authority for the proposition that a principal is not liable for the fraud of his agent unless committed for the benefit of the principal. In the second place, it is extremely unlikely that Sir Montague Smith, who

(1) (1912) App. Cas. 716.

(2) (1887) 18 Q. B. D. 714 (718).

(3) (1906) App. Cas. 439 (465).

(4) (1867) L. R. 2 Exch. 259.

(5) (1878) L. R. 5 I. A. 130; I. L. R. 4 Calc. 116.

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was a party to the decision in *Barwick v. English Joint Stock Bank* (1), should have misunderstood its effect and misapplied it in *Burma Trading Corporation v. Mirza Mahomed Ali* (2), the judgment wherein was pronounced with his concurrence by Sir Robert Collier. In the third place, the decision of the Judicial Committee was based on the ground that the acts of the alleged agent could not be treated as the wrongful acts of a servant or agent committed in the course of his service, for the plain reason that at that time it was not shown that he was a servant or an agent for the purpose of working in the forest on behalf of the company or of doing any class of acts analogous to those complained of. Consequently no question could arise whether the liability of the principal depended on the circumstance whether the wrong had been committed by the servant for the benefit of the master. On the other hand, Sir Robert Collier quotes with approval the observation of Willes J. "in all these cases it may be said that the master had not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." The true meaning and effect of the ruling of Willes J. in *Barwick v. English Joint Stock Bank* (1), which was approved by the Judicial Committee in *Burma Trading Corporation v. Mirza Mahomed Ali* (2) may also be ascertained from the opinion of the Judicial Committee in two other cases, *Mackay v. Commercial Bank* (3) and *Swire v. Francis* (4), the judgments wherein were delivered by Sir Montague Smith and Sir Robert Collier, respectively. Reference may further be made to the decision of the House of Lords in *Houldsworth v. City of Glasgow Bank* (5), where *Barwick v. English Joint Stock Bank* (1), *Mackay v. Commercial Bank* (3) and *Swire v. Francis* (4), are examined and explained. Lord Selborne observes that the principle on which those cases were decided was a principle, not of the law of torts or of fraud or deceit, but of the law of agency, and adds: "the decisions in all these cases proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because, as it was well put by Mr. Justice Willes in *Barwick v. English Joint Stock Bank* (1), with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no

(1) (1867) L. R. 2 Exch. 259.

(2) (1878) L. R. 5 I. A. 130.

(3) (1874) L. R. 5 P. C. 394.

(4) (1877) 3 App. Cas. 106.

(5) (1880) 5 App. Cas. 317.

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sensible distinction can be drawn between the case of fraud and the case of any other wrong." Lord Blackburn is equally explicit: "the substantial point decided was that an innocent principal was civilly responsible for the fraud of his authorised agent acting within his authority to the same extent as if it was his own fraud." To the same effect is the exposition by Story in his classical work on Agency (section 452, 456) where that distinguished lawyer states: "the principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorise or justify or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved of them." The learned author adds: "the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done or he has subsequently adopted them for his own use and benefit." This statement of the law was accepted by Blackburn J. in *McGowan v. Dyer* (1) and had been foreshadowed nearly two centuries earlier, when Holt, C. J. held in *Hern v. Nichols* (2), that a merchant was accountable for the deceit of his factor, though not *criminaliter* yet *civilliter*, "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." This position is well illustrated by the decisions in *National Exchange Company v. Drew* (3); *Brockeloby v. Temperance P. B. Society* (4); *Pearson v. Dublin Corporation* (5); *Citizen's Life Assurance Co. v. Brown* (6); *Glasgow Corporation v. Lorimer* (7); *Bowles v. Stewart* (8); and *Fitz Simons v. Duncan* (9). It may be observed that the rule as formulated by Story is in accord with a long line of authorities in the Courts of the United States, where an instructive attempt has been repeatedly made to justify the doctrine on principle. Thus, in *Higgins v. Wateroliet* (10), Mr. Justice Andrews observed: "every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such care by the latter is the omission by the principal, and for injury

(1) (1873) L. R. 8 Q. B. 141 (145).

(3) (1855) 2 Macqueen H. C. 103.

(5) (1907) A. C. 351.

(7) (1911) A. C. 209.

(9) (1908) 2 I. R. 483.

(2) (1708) 1 Salkeld 289.

(4) (1895) App. Cas. 173.

(6) (1904) A. C. 423.

(8) (1803) 1 Sch. and Lef. 209.

(10) (1871) 46 N. Y. 24; 7 Am. Rep. 293.

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resulting therefrom to others, the principal is justly held liable. If he employs incompetent or untrustworthy agents, it is his fault ; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim *respondeat superior* applies, provided only that the agent was acting at the time for the principal and within the scope of the business." Again, in *Jackson v. American Telephone Co.* (1) Mr. Justice Walker observed : "Whoever commits a wrong is liable for it, and it is immaterial whether it is done by him in person or by another acting by his authority, express or implied. *Qui facit per alium, facit per se.* Upon this maxim of the law, is founded the doctrine that the principal is liable for the tort of his agent, and the master for the tort of his servant. If the wrongful act is done by express command of the master, or even if he has afterwards made it his own by adoption, there is no difficulty in applying the rule ; but it is otherwise when the liability must proceed only from an implied authority. Where the servant does a wrong to a third person, the rule of *respondeat superior* applies, and the master must answer for the tort, if it was committed in the course and scope of the servant's employment and in furtherance of the master's business." In *Alger v. Anderson* (2), the Court observed that the doctrine broadly stated is rested upon the ground "that the principal having held the agent out as having authority and having clothed him with power to act in a particular matter, as between two innocent persons, should suffer as having given occasion for the loss." The truth is that this rule of liability is based upon grounds of public policy ; it seems more reasonable that where one of two innocent persons must suffer from the wrongful act of a third person, the principal who has employed and retained a dishonest agent and has placed him in a position of trust and confidence should suffer for his misdeeds rather than a stranger : *Philadelphia Railway Co. v. Derby* (3) ; *Washington Gas Light Co. v. Lansden* (4) ; *Mac Intire v. Pryor* (5) ; *Foster v. Essex Bank* (6) ; *Reynolds v. Witte* (7) ; *Andrews v. Solomon* (8) ; *Milburn v. Wilson* (9).

Reference may also be made to the decisions in *Subjan v.*

(1) (1905) 139 N. C. 347 ; 51 S. E. 1017 ; 70 L. R. A. 738.

(2) (1897) 78 Fed. 729 (735).

(3) (1852) 14 Howard 480.

(4) (1898) 172 U. S. 534.

(5) (1898) 173 U. S. 38.

(6) (1821) 17 Mass. 508 ; 9 Am. Dec. 168.

(7) (1879) 13 S. C. 5 ; 36 Am. Rep. 678.

(8) (1816) Peter C. C. 360 ; 1 Fed. Cas. 378.

(9) (1901) 31 Can. Sup. Court. 481.



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*Sariah-ulla* (1); *Morrison v. Verschoyle* (2); *Isvar Chunder v. Satish Chunder* (3); *Gopal Chandra v. Secretary of State* (4) and *Motilal v. Govindram* (5). These cases recognise the doctrine that acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent, even though he did not in fact authorise the commission of the fraudulent act. There are, no doubt, dicta in some of these cases, based apparently upon a misapprehension of the rule enunciated by Willes J. in *Barwick v. English Joint Stock Bank* (6), and, particularly, of the expression, "for the master's benefit." The true meaning and scope of the rule, however, has now been settled beyond controversy by the decision of the House of Lords in *Lloyd v. Grace* (7). The principle expounded there is based, as we have seen, on 'justice, equity and good conscience' and no conceivable reason has been suggested why it should be held inapplicable to this country.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

**Roe, J.**—Negligence and malice, mistake and fraud are so closely allied that they are often not to be distinguished. It could never be and never was a good defence to an action upon tort done by a servant or by an agent, to plead that the tort was done not by accident but on purpose.

My learned brother has so fully traced to its source and exposed the fallacy that to render the master liable for the act of the servant must be for his master's benefit, that there remains nothing for me to add. The sole test is the scope of the agent's authority.

In the case before us the act done by the agent was clearly within the scope of his authority.

I agree that the principal is liable and that the appeal be dismissed with costs.

A. T. M.

*Appeal dismissed.*

(1) (1869) 3 B. L. R. 413.

(2) (1901) 6 C. W. N. 429.

(3) (1902) I L. R. 30 Calc. 207.

(4) (1909) I L. R. 36 Calc. 647.

(5) (1905) I. L. R. 30 Bom. 83 (87).

(6) (1867) L. R. 2 Exch. 259.

(7) (1912) A. C. 716.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.*

SRIS CHANDRA DATTA CHAUDHURI AND OTHERS

*v.*

MAHIMA CHANDRA DATTA CHAUDHURI AND ANOTHER.\*

CIVIL.

1915.

May, 10, 11

*Partition—Suit for partition by lessee against co-sharers of lessor, if maintainable.*

Two properties A and B were jointly owned by X and Y. By mutual arrangement X held possession of A, while Y of B, but no final and definitive partition was effected between the parties. Y, though in possession of B, transferred to Z his one-half share in A :

*Held*, that Z was entitled to claim partition as against X.

A partition suit can include no property wherein each of the parties to the suit does not claim an interest.

*Ramlaran v. Hari Charan* (1) and other cases referred to.

Appeal by Defendants Nos. 1 to 3.

Suit for partition of joint property.

The material facts and arguments appear from the judgment.

*Babus Joges Chunder Roy and Gunada Charan Sen* for the Appellants.

*Babu Brojendra Nath Chatterjee* for the Respondents.

The judgment of the Court was delivered by

**Mookerjee, J.**—This is an appeal by the first three defendants in a suit for partition of joint property. The substantial question now in controversy between the parties is, whether the suit as framed is maintainable

The disputed property, the subject matter of the partition claimed by the plaintiffs, is included in an estate Azimpur which has been divided and formed into five separate estates. One of these divisions is called Choi Hissya, wherein the sixth defendant has a share. The plaintiffs have acquired the position of permanent tenure-holders under the sixth defendant in a taluq Ananda Bose and a howla Chandraprabha ; they claim an one anna nineteen and a half gandas and one til share in the howla and taluq mentioned. Their allegation is that the lands now in suit, which are comprised in mouza Icholi, are included in the Choi Hissya estate and have been separated by metes and bounds so as to be capable of partition without reference to other lands of the estate. The defendants, who are some of the proprietors of the estate and the lessors under them,

Appeal from Appellate Decree No. 1931 of 1911, against the decree of Babu Rebbati Kanta Nag, Subordinate Judge of Backergunge, dated the 26th April, 1911, reversing that of Babu Chandra Kumar Chatterjee, Munsiff of Barisal, dated the 11th February, 1910.

(1) (1913) 18 C. L. J. 536.

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contend that the plaintiffs are not entitled to maintain this suit for partition in respect of these lands alone, but are bound to claim partition of all the lands in the Choi Hissya estate, although the plaintiffs have no interest in any lands other than those now in dispute. The Court of first instance gave effect to this contention and dismissed the suit. Upon appeal the Subordinate Judge has reversed that decision and made a preliminary decree for partition. In our opinion the decree of the Subordinate Judge is manifestly correct.

It cannot be disputed, in view of the decision of the Full Bench in *Hemadri Nath Khan v. Ramani Kanta Roy* (1), and of the Judicial Committee in *Bhagwat Sahai v. Bepin Behari Mitter* (2); that the fact that the plaintiffs are permanent tenure-holders and seek partition as against the co-sharers of their lessors in the estate, is no objection to the grant of relief to them. But it has been argued on behalf of the defendants appellants that as, by private arrangement amongst the co-proprietors, separate parcels of the lands of the Choi Hissya estate have been in occupation of different proprietors, the plaintiffs as lessees under some of them should not be allowed to maintain a suit for partition of the lands included in the one mouza wherein alone they are interested and thereby to disturb the arrangement, made by the superior landlords. The contention in substance is that the plaintiffs are in no better position than their grantor and as their grantor would not in ordinary circumstances have been allowed to maintain a suit for partition as against his co-sharers in respect of a portion only of joint property, the plaintiffs are under a similar disability. This argument has been controverted as unsound on behalf of the respondents and the principle has been challenged as too comprehensive that a suit for partition must in all circumstances include all the joint properties owned by the parties to the suit. In support of this view reliance has been placed upon the decisions in *Padmamani Dasi v. Jagadamba Dasi* (3); *Punchanun v. Shib Chunder* (4); *Ram Mohan v. Mul Chand* (5); *Syed Habibur v. Ashita Mohan* (6); and *Hem Chandra Chowdhury v. Hemanta Kumari Debi* (7). We may state at once that it is not necessary for the purposes of the present case to maintain the view that a suit for partition need not embrace all the joint properties owned by the parties thereto. We shall

(1) (1897) I. L. R. 24 Calc. 575.

(2) (1910) I. L. R. 37 Calc. 918 P. C.; 12 C. L. J. 240 P. C.

(3) (1871) 6 B. L. R. 134.

(4) (1887) I. L. R. 14 Calc. 835.

(5) (1905) I. L. R. 28 All. 39.

(6) (1908) 12 C. W. N. 640.

(7) (1914) 19 C. W. N. 356.

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accordingly assume that, as an ordinary rule, a suit for partition must include all the properties jointly held by the parties: *Jogendra Nath v. Jugobundhu* (1); *Jogendra Nath v. Baldev Das* (2); *Fuslur v. Mahomed Fayzur* (3); *Satya Kumar v. Satya Kripal* (4); *Monsharam v. Gonesh* (5). But as a necessary corollary to this rule, we have the complementary principle that a partition suit can include no property wherein each of the parties to the suit does not claim an interest: *Ramtaran Nag v. Hari Charan Nag* (6); *Radha Kanta v. Bipro Das* (7); *Ram Lochhi Koer v. Collingridge* (8); *Kailash Chandra Das v. Nityananda Das* (9); *Uma Sundari Debi v. Benode Lal Pakrashi* (10); *Ram Mohan Lal v. Mul Chand* (11); and *Subba Row v. Annathanarayana* (12). But on behalf of the appellant this principle has been assailed as inequitable; we are unable, however, to give effect to this criticism.

Take one concrete illustration. Suppose two properties A and B are jointly owned by X and Y. By mutual arrangement X holds possession of A, while Y holds possession of B, but no final and definitive partition is effected between the parties. Y, though in possession of B, transfers to Z his one-half share in A. Is Z entitled to claim partition as against X? There is no room for controversy that Z is entitled to maintain a suit for this purpose, though the result may be that X will thereby be driven to sue Y for partition of B. But this does not involve any hardship upon X; when he consented to take exclusive possession of A and allowed his co-owner Y to occupy B, he did so with full knowledge that the arrangement might be disturbed by partition, whether that partition was effected at the instance of Y or of a transferee from Y. If this view were not maintained, it would be necessary to hold that when by mutual arrangement, co-owners are in possession of different parcels of land included in their joint property, their right of alienation is restricted thereby. In the case mentioned, as soon as Y transfers his interest in A to Z, A ceased to be part of the joint property owned by X and Y and acquires the character of joint property held by X and Z; at the same

(1) (1886) I. L. R. 14 Calc. 122.

(2) (1907) 6 C. L. J. 735; I. L. R. 35 Calc. 961.

(3) (1911) 15 C. W. N. 677.

(4) (1909) 10 C. L. J. 503.

(5) (1912) 17 C. W. N. 521.

(6) (1913) 18 C. L. J. 556.

(7) (1904) 1 C. L. J. 40.

(8) (1906) 5 C. L. J. 307.

(9) (1909) 11 C. L. J. 384.

(10) (1907) I. L. R. 34 Calc. 1026.

(11) (1905) I. L. R. 28 All. 39.

(12) (1912) 23 M. L. J. 64; 11 M. L. T. 395.

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time, B retains its character of joint property owned by X and Y. Consequently in respect of A either X or Z is entitled to claim partition against the other; and a similar position must be maintained with regard to Y. In the case before us, it has been urged that the plaintiffs should not be granted relief till they institute a suit for partition, not merely of the lands comprised in mouza Icholi wherein alone they are interested as permanent tenure-holders, but also in ninety-nine other mouzahs which are comprised in the Choi-hissya Zemindary, and wherein they have no interest at all. To give effect to this contention would be to affirm the principle that the plaintiffs can institute a suit for partition in respect of property in which they possess no interest whatsoever; no conceivable theory has been suggested to support such a view, while section 44 of the Transfer of Property Act clearly points to the contrary conclusion. We may add that reference was made in the course of argument to the case of *Shivmurleppa v. Viruppa* (1) which is plainly distinguishable on the ground that there the subject matter of the litigation was co-parcenary property held by members of a joint Mitakshara family.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

We may mention that an objection has been raised before us in respect of parcel 75. The parties are agreed that the question whether parcel 75 is liable to be partitioned as included in mouza Icholi in the Choi-Hissya Zemindary should remain open for determination by the Court below before the final decree for partition is made; a declaration to this effect will accordingly be inserted in the decree.

A. T. M.

*Appeal dismissed.*

(1) (1899) I. L. R. 24 Bom. 128.

*Before Mr. Justice Holmwood and Mr. Justice Mullick.*

KALIPADA KARMAKAR AND OTHERS

*v.*

SHEKHAR BASINI DASIA AND ANOTHER.\*

CIVIL

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November, 23.

*Appeal—Suit for rent—Bengal Tenancy Act (VIII of 1885), Sec. 153 (b)—Relationship of landlord and tenant—Second appeal—No appeal from primary Court maintainable.*

No appeal lies from a decision of a Court specially empowered to exercise final jurisdiction under section 153 (b) of the Bengal Tenancy Act, in a suit for rent valued less than Rs. 50, deciding a question of whether or not the relationship of landlord and tenant existed.

*Shilabati v. Roderiques* (1) followed.

Where no appeal lies from a primary Court to the first appellate Court, no second appeal lies from the latter Court to the High Court.

*Bhagabati v. Nanda* (2) followed.

Appeal by the Defendant.

Suit for rent.

The material facts and arguments appear from the judgment.

*Babu Baranashibasi Mukerjee* for the Appellants.

*Babus Sarat Chandra Roy Chowdhury and Sasadhar Roy (Jr.)* for the Respondents.

The judgment of the Court was delivered by

**Holmwood, J.**—This second appeal arises out of a rent suit brought under rather curious circumstances. The plaintiff, a lady, alleging that she purchased the land from the original proprietor, sued her father as a tenant for rent, for the last two years of her vendor's incumbency and for the first two years of her possession. The father set up the title in himself and said that he purchased the holding benami in the name of his daughter and leased it out to his son-in-law nominally for his daughter. The learned Munsiff declined to have any thing to do with these conflicting claims and decided that, because the plaintiff had not attempted to collect or collected any rents from her father, the relationship of landlord and tenant did not exist. The matter went in appeal before the learned District Judge, and he held, on a preliminary objection, that the question of the conflicting title to or interest in the land had been decided by the Munsiff and that it was competent to him to deal with the appeal and accordingly he dealt with it and found clearly on the facts that

November, 23.

\* Appeal from Appellate Decree No. 1706 of 1913, against the decree of R. N. Dutta, Esq., District Judge of Khulna, dated the 5th April, 1913, reversing that of Babu Srish Chandra Banerjee, Munsiff of 1st Court at Satkhira, dated the 26th April 1912.

(1) (1908) I. L. R. 35 Cal. 547.

(2) (1908) 12 C. W. N. 835.

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the lady was speaking the truth and was supported up to the hilt by the necessary document and that the story told by the father was a mere pretence to get rid of his liability.

In appeal before us it is argued that the decision of the Munsiff being simply that the relationship of landlord and tenant did not exist between the parties inasmuch as no rents had ever been collected was a decision from which there was no appeal, the amount of rent claimed being under Rs. 50. In reply the learned vakil for the respondent strenuously argued that this case falls under those exceptional instances which are referred to in two cases, one case being *Sita Nath Pal v. Kartick Gharami* (1) and the other *Ram Kanai Dass v. Fakir Chund Dass* (2). We are, however, of opinion that the ruling in *Shilabati Debi v. Roderiques* (3) which is perfectly general in its terms applies equally to this case as to every other case in which there has been no actual decision of the conflicting claims or interest in the land.

The learned vakil took a second point that the suit was for rent immediately after the lady's purchase and that the decision that no rent was collected was no decision at all and the Munsiff had therefore, failed to exercise a jurisdiction vested in him by law and that as the plaintiff had, with the appeal to the District Judge, filed an application under the proviso to section 153 of the Bengal Tenancy Act for revision, the lower appellate Court was perfectly competent to pass the decision he did. Here, again, we must rule against the respondent on the simple ground that the lower appellate Court did not act under the proviso but distinctly found that an appeal did lie and decided the appeal on the merits.

But there is a third ground upon which we are clearly of opinion that the respondent must succeed. It is laid down in the case of *Bhagabati Bewa v. Nanda Kumar Chuckerbutty* (4) that if no appeal lies from a Munsiff to a Subordinate Judge, no appeal lies from the Subordinate Judge to this Court and that dictum is expressed in the most general terms and is obviously based upon common sense, for, if the first appeal is a nullity, *ex hypothesi* there cannot be a second appeal. The learned vakil for the appellant asks us to deal with the matter under section 115 of the Code of Civil Procedure, as, no doubt, we are fully empowered to do, even though no application has up to date been made for that purpose. But when we are asked to exercise this extraordinary jurisdiction in revision *nostro motu* it becomes necessary to consider the merits of the case; and, on read-

(1) (1900) 8 C. W. N. 434.

(2) (1904) 8 C. W. N. 438.

(3) (1908) I. L. R. 35 Calc. 547.

(4) (1908) 12 C. W. N. 835.

ing the learned Judge's judgment, it is perfectly plain that no good purpose whatever can be served by allowing this unfortunate litigation between a father and daughter to continue. There is the clearest finding, as we have already said, that the lady's story is established both by oral and documentary evidence beyond any doubt, and it is not, in the least, likely that this Court would interfere in revision in the face of such findings of fact by a very experienced District Judge.

The result is that the appeal is dismissed. Under the circumstances the parties will bear their own costs throughout, and the decree of the lower Court will be modified to that extent.

A. T. M.

*Appeal dismissed.*

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Holmwood, J.

## CIVIL REFERENCE.

*Before Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.*

*In the Matter of* PURNA CHANDRA  
ADDY, PLEADER.\*

CIVIL.

1915.

November, 22, 23.  
December, 22.

*Pleader—Unprofessional conduct—Legal Practitioners Act (XVIII of 1879), Secs. 13 (b), 14.—Pleader, a party to suit—Pleader, a party, threatening to sue Court for unwarrantable act—Notice based on error of law—Anonymous complaint to Judge.*

Two brothers, one being a pleader, had an execution case in the Court of Munsiff. On the date fixed for sale, the decree-holders found out that the sale proclamation had not been duly published. They applied for the issue of a fresh sale proclamation on the ground that the non-publication was due to the negligence of the Court officers. The Munsiff rejected it however and struck off the case. They caused a notice to be written and served on the Munsiff threatening him with legal proceedings to recover the costs. The learned Munsiff made a report to the District Judge, who instituted proceedings under section 14 of the Legal Practitioners Act against the pleader. The learned Judge asked him to apologise but he chose to stand upon his legal rights and did not. Thereupon he referred the matter to the High Court under section 14 of the Legal Practitioners Act holding that the pleader was guilty of grossly improper conduct in the discharge of his professional duty :

*Held*, that the reference should be discharged as the case was not within section 13 (b) of the Legal Practitioners Act.

*Per D. Chatterjee J.* : What was done in this case was done "by an individual in the capacity of a suitor in respect of his supposed rights as a suitor and of

\*Reference No. 6 of 1915, by H. L. Allanson Esq., District Judge of Cuttack under the Legal Practitioners Act, on a report made by Babu Jotindra Nath Ghose, Munsiff, 2nd Court of Puri, dated the 25th February, 1915.



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*In the matter of*  
*Purna Chandra*  
*Addy.*

an imaginary injury done to him as a suitor and it had no connection whatever with his professional character, or anything done by him professionally."

*In re Wallace* (1); *In the matter of Jogendra Narayan Bose* (2); *In the matter of a First Grade Pleader* (3); and *In re a Pleader* (4) referred to.

The mere fact of filing a petition by a legal practitioner, ultimately turning out to be based on grounds which are not maintainable on a point of law, does not constitute on his part, an improper conduct within the meaning of section 14 of the Legal Practitioners Act.

*In the matter of Sarat Chandra Guha* (5) followed.

*Per Beachcroft J.*: That on the facts stated the Munsiff's order dismissing the execution case was wholly indefensible. Human nature being what it is, one must not view the action of the pleader too seriously. That having had time for reflection he should have offered an apology to the Munsiff.

The impropriety of addressing anonymous complaints to Court in connection with pending litigation stated.

Reference by the learned District Judge under section 14 of the Legal Practitioners Act.

*Babus Sarat Chandra Roy Chowdhury, Satya Charan Sinha and Dharendra Krishna Ray* for the Pleader.

*Babu Ram Charan Mitra* in support of the Reference.

C. A. V.

The judgments of the Court were as follows :

*December, 22.*

**D. Chatterjee, J.**—*Babu Purna Chandra Addy* is a pleader practising in the Courts at Puri. He and his cousin *Mohes* had an execution case before the Second Munsiff of Puri. On the date fixed for sale the decree-holders found out that the sale proclamation had not been duly published. They applied for the issue of a fresh sale proclamation on the ground that the non-publication was due to the negligence of the Court officers. If the facts were, as stated above, the most proper and just course for the learned Munsiff would have been to grant the application. He rejected it however and struck off the case and the whole cost of the execution was lost for no default of the decree-holders. They were naturally annoyed and took legal advice as to whether they could recover damages from the Munsiff. It is said that they were advised that such a case would lie, their advisers relying on the case of *Tarucknath Mookerjee v. The Collector of Hooghly* (6). *Mohes* insisted upon fighting out the case and a notice was given to the Munsiff signed by *Mohes* but written out by *Babu Purna Chandra* to the following effect.—"We have by your illegal and unwarrantable conduct as aforesaid suffered a loss of Rs. 7-7-3 p. being the amount of costs incurred as specified below:

(1) (1866) L. R. 1 P. C. 283.

(3) (1900) I. L. R. 24 Mad. 17.

(5) (1900) 4 C. W. N. 663.

(2) (1900) 5 C. W. N. 48.

(4) (1907) 18 M. L. J. 184.

(6) (1870) 13 W. R. 13.

I hereby give you notice that both the aforesaid Babu Purna Chandra Addy and myself shall adopt legal proceedings against you for the said sum." The learned Munsiff made report to the District Judge of Cuttack and the said officer instituted proceedings under section 14 of the Legal Practitioners Act against Babu Purna Chandra for grossly improper conduct in the discharge of his professional duty inasmuch as the letter of notice was in his handwriting and must have been written with his knowledge and by his advice and inasmuch as he knew that no such suit would lie, his action in writing it and allowing it to be signed by Mohes was not *bona fide* and was dictated by a desire to harass the Munsiff. Babu Purna Chandra in showing cause said that the notice was given under legal advice without any intention of harassing the learned Munsiff and if the advice was wrong he had acted *bona fide* as a litigant in the exercise of his legal rights and not as a pleader acting for a client and no charge of professional misconduct could lie.

The learned Judge asked him to apologise, but he chose to stand upon his legal rights and did not. The learned Judge has therefore made this reference under section 14 of the Legal Practitioners Act holding that the pleader was guilty of grossly improper conduct in the discharge of his professional duty.

It is contended before us that the reference is incompetent and should be discharged.

I think that this contention is right. What was done in this case was done "by an individual in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor and it had no connection whatever with his professional character, or anything done by him professionally": See *In re Wallace* (1); *In the matter of Jogendra Narayan Bose* (2); *In re a Pleader* (3); *In The Matter of a First-grade Pleader* (4). The learned Senior Government pleader who appeared in this case on notice from the Court did not support the reference as one warranted by clause (b) of section 13, but he said that the language used was intemperate and as the pleader did not accept the invitation of the Judge to make an apology he deserved some censure by this Court. The language was perhaps a little harsh but it was the language of a litigant smarting from what he considered a wilful disregard of his just rights merely for the sake of administrative despatch when the greater part of the fault was not with him but with the officer of the

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Purna Chandra  
Addy.

*D. Chatterjee, J.*

(1) (1866) L. R. 1, P. C. 283.

(2) (1900) 5 C. W. N. 48.]

(3) (1907) 18 M. L. J. 184.

(4) (1900) I. L. R. 18 Mad. 17.

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Purna Chandra  
Addy.

*D. Chatterjee, J.*

Court. Then again the part that he took in helping his co-litigant to give the notice was an insignificant one, he merely copied the letter and refrained from joining openly in the assertion of what he was advised was his legal right. It is admitted by his learned Vakil that the advice was wrong, and in the absence of malice his client had no right to maintain a suit for damages for a judicial act, but that does not take the case further than this that he and his advisers committed an error of law. No doubt the error was rather serious in this case as it led to a breach of that amity and mutual understanding which should always exist between the Bench and the Bar: justice to the litigant is the end for which the Bench and the Bar are the means and the powers of the one and the privileges of the other are ordained for the attainment of that end by their harmonious co-operation. It is to be regretted therefore that there was a discord in this case. The error however was nevertheless an error of law which cannot be treated as professional misconduct: See *In the matter of Sarat Chandra Guha* (1). He has however in this Court through his Vakil expressed his regret for what has happened and there is an end of the matter.

I may in this connection mention that while the case was awaiting judgment I received a type-written envelope posted at Puri and enclosing some newspaper cuttings containing aspersions against the Munsiff concerned in this case. Babu Purna Chandra through his Vakil disowns all knowledge of this and expresses his regret that any body should have done it. I accept his statement and hold him blameless in the matter. I think it my duty however to say that whoever may be responsible for the sending of these cuttings in an anonymous cover with a type-written superscription which cannot be identified is guilty of a gross contempt of Court. It is an attempt to interfere with the due administration of justice: it is unfair to the party for whose benefit it is done: it is unfair to the party slandered who has no means of meeting it and it is unfair to the Court which might humanly speaking be unconsciously influenced without being able to deal with the perpetrator in due course of law. Conduct like this is cowardly, ungentlemanly and in the highest degree reprehensible and I hope no one connected with the Puri bar had any hand in it.

In this view of the case, I discharge the Rule.

**Beachcroft, J.**—I agree that the Reference ought to be

(1) (1900) 4 C.W. N. 663.

discharged on the ground that the case is not one within section 13 (b) of the Legal Practitioners Act. I am, however, sceptical of the truth of the pleader's allegations that he took and acted on other legal advice in sending the objectionable letter to the Munsiff. But even if it be assumed that it was sent with the intention of annoying the Munsiff, I do not think it necessary to take any further notice of the matter.

We have no explanation from the Munsiff as to why he rejected the prayer for issuing a fresh sale proclamation in the execution proceedings, but on the facts stated his order dismissing the execution case appears to be wholly indefensible. The Munsiff ought to have been thankful to the decree-holders for bringing to his notice the defect in the execution proceedings, and incidentally in the working of his office, instead of penalizing them for it. Human nature being what it is, one must not view the action of the pleader too seriously. Having had time for reflection he would have been well advised to accept the suggestion of the learned District Judge and offer an apology to the Munsiff. I am not impressed by the offer of an apology in this Court at the eleventh hour when the pleader felt that he might get into trouble. But in the circumstances the matter may now be allowed to rest.

I associate myself with the strictures of my learned brother on the sending of anonymous communications.

A. T. M.

*Reference discharged.*

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1915.

*In the matter of  
Babu Purna  
Chandra Addy.*

*Beachcroft, J.*

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John  
Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee,  
Knight, Judge.*

SAROJINI DASSI AND OTHERS

*v.*

GNANENDRA NATH DAS AND OTHERS\*

AND

SURENDRA NATH DAS

*v.*

GNANENDRA NATH DAS AND OTHERS.\*

CIVIL.

1915.

*December, 2, 14.*

*Will, construction of—Dedication to idols—Complete dedication or charge—Surplus income arising from debutter estate—Accumulation—Power given to shewait to invest—Cash and money—Devise of residuary estate.*

\* Appeals from Original Decrees Nos. 25 and 27 of 1915, against the decrees of Mr. Justice Chitty, dated the 17th December 1914, sitting on the Original Side of the High Court.

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*Held*, on the construction of the will in question that there was a valid trust for religious and charitable purposes with regard to the surplus income arising from the *debutter* estate.

That the clause relating to accumulation was merely incidental to the provisions relating to dedication and management of the property.

That a power was given to the shebait from time to time in the course of the management of the properties to make safe investment of surplus income and thus increase the *debutter* fund, and a direction was necessarily implied that the income not required for the specified expenses, should be used within a reasonable time and in a reasonable way for other religious ceremonies and other charitable work. It was left to the discretion of the shebait to decide the exact form and the exact time when the income should be so used.

The term 'cash' used by the testator in clause 12, did not include arrears of rent, debts due and the like properties.

Clauses 12, 13 and 14 of the will, contained a devise of the residuary estate to his two sons.

*Per Sanderson, C. J. and Woodroffe J.*—The word 'cash' in the ordinary acceptation of the term has a narrower meaning than money, and when taken in conjunction with the words 'Government Promissory Notes,' means cash in the ordinary meaning of the word.

*Per Mookerjee, J.*—That clause 1 of the will constituted a complete dedication of all the property to the idols; it did not create merely a charge on the property in favour of the idols.

Where there is an unconditional gift to charity, a direction for accumulation is invalid.

The trustees of a charity are not bound to spend the whole of the income of the charity every year; they can lay by money for an ulterior purpose, just as an individual can, provided the purpose is within the scope of the charitable trust.

In case of doubt, one should so read the will as to lead to a testacy and not to an intestacy.

*In re Redfern* (1); *In re Harrison* (2); *Kirby Smith v. Parnell* (3) and *In re Edwards* (4) referred to.

Appeals by three of the Defendants in No. 25 and by one of the Defendants in No. 27.

Suit for construction of will, which was as follows:

"I, Srinath Das, son of Ram Lochan Das deceased of 10, Srinath Das' Lane, Bowbazar, Calcutta, at present a practising Vakil of the Calcutta High Court, do hereby execute this document as my last Will and testament.

"This Will replaces the one I formerly executed and deposited with the Registrar of Calcutta bearing date the 11th of October 1898 and the same I do hereby set aside.

"The disposition of my properties which I make by this Will is as follows:—

(1) (1877) 6 Ch. D. 133 (136).

(3) (1903) 1 Ch. 483 (489).

(2) (1885) 30 Ch. D. 390 (393).

(4) (1906) 1 Ch. 570.

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"At present the family idols Lakshmi-Janardan and Mangal Chandi are located in my family dwelling house 10, Srinath Das' Lane, and are being daily worshipped there. The Durgapuja, the Jagadhatripuja and the Dolejatra ceremony also are regularly performed there every year. I desire to perpetuate the daily worship of the aforesaid family idols and also the performance of the ceremonies abovenamed and for that purpose I dedicate to the said family idols abovenamed my family dwelling house 10, Srinath Das' Lane. The said idols shall always remain and be daily worshipped in the said house and the said ceremonies also will be annually performed there. I also dedicate to the said idols my properties in Zilla Khulna whether in Zemindaries, Taluks, Ganties or any other rights and any other property which I may acquire there, the premises Nos. 1, 4, 9, 11, 17, Srinath Das' Lane, No. 14, Wellington Street, Calcutta, and the Benares house with the furnitures therein as debutter properties. The said Benares house shall remain under the control and the supervision of the Shebait for the time being, but shall be available to all the members of my family both male and female for temporary residence and use. The expenses of the daily worship of the said family idols and the performance of the abovenamed ceremonies shall be met out of the income of the abovementioned debutter properties. The expenses for the above purposes shall be as follows:—Re. 1 (one rupee) shall be spent every day for the daily worship of the said Thakurs Lakshmi-Janardan and Mangal Chandi, Rs. 2,500 (two thousand and five hundred) every year for the Durgapuja and its accompanying ceremonies, Rs. 1,000 (one thousand) every year for the Jagadhatripuja and its accompanying ceremonies; and Rs. 500 (five hundred) every year for the Dolejatra and its accompanying ceremonies. Besides these expenses the Shebait for the time being shall get for his own personal use Rs. 200 (two hundred) a month for managing the debutter properties abovementioned.

The Government revenues, rents, cesses, taxes and the costs for the management and repairs of the above properties shall also be paid out of the income of the said properties. If after defraying all the abovementioned expenses any money be left in the hands of the Shebait for the time being, the same shall accumulate as a debutter fund. The Shebait for the time being shall meet any emergent and unforeseen expenses out of the said funds and shall have power to make any safe investment and to acquire other properties and thus to increase the corpus of the debutter estate. Out of the income of such fund the Shebait for the time being shall also have power to:

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celebrate the Puja of any other God or Goddess of the Hindus to perform any other religious ceremonies or to perform any other charitable work. The abovementioned properties and the income thereof or any portion of the same shall never belong to any of my heirs or any of the Shebaita nor shall the same be in any way liable for his personal debts.

"12. Out of Government Promissory Notes and cash left by me the costs of taking out probate shall be paid and Rs. 5,000 (five thousand) shall be spent for the performance of my Sradh, and the following legacies shall be paid :—Rs. 500 (five hundred) to my Sarkar Kamikhya Nath Ghosh, if he remains in my service till my death, Rs. 300 (three hundred) to my cashier Sasi Bhusan Bose, if he remains in my service till my death, Rs. 300 (three hundred) to my Purohit Dwarikanath Chatterji, Rs. 200 (two hundred) to my Guruputra, Rs. 100 (one hundred) to my servant Pandav, if he remains in my service till my death. If anything remains, after meeting the abovementioned expenses and paying the legacies and debts, if any, the same shall be equally divided between my said two sons Surendra Nath Das and Rajendra Nath Das.

"13. In order to take out the probate of this Will, to pay the legacies mentioned herein and to do every thing necessary in order to give effect to this Will, I do hereby appoint my two sons Surendra Nath Das and Rajendra Nath Das and Babus Sarat Chandra Rai Chowdhury and Braja Lal Chakravarti as executors. The executors shall also realise all debts due to me and administer all my effects so far as necessary for carrying out the provisions of this Will."

The material facts are stated in the judgment of Mr. Justice Chitty.

**Chitty, J.:**—I do not think that any useful purpose would be served by reserving judgment in this case.

The suit has been brought by Gnanendra Nath Das and Srimutty Krishno Bhabini Dasi for the construction of the Will of the late Sreenath Das, a vakil of this Court, who died on 13th September, 1907. The plaintiffs also pray for administration, accounts and so forth. The Will, which is dated 13th January 1904 is in the English language, and except for a portion of the movable property, makes a full disposition of the testator's estate. The first point which has been argued before me is as to the dedication to the family idols of the property mentioned in the first clause. The plaintiff's case is, that this is not a complete dedication to the idol. They argue that so far as the sums mentioned by the testator at the end of the first paragraph of the Will are concerned,

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such expenditure might form a charge on the properties said to be dedicated; that the properties would be dedicated only to the extent of that charge; and that, as to any surplus, there would be an intestacy. As to who would take it, there is again a question, which, in the view that I take of the first clause it is unnecessary to decide. By that clause, the testator expressed a desire to perpetuate the daily worship of the family idols, Lakshmi Janardan and Mangal Chandi, which were located in his family dwelling house, No. 10 Sreenath Das' Lane, and for that purpose he dedicated to the said family idols the said family dwelling house, and directed that the idols should remain in daily worship there, and that the ceremonies should be annually performed there. The Will continues, "I also dedicate to the said idols my properties in Zillah Khulna, whether in zemindaries, Taluks, Gantis or any other right, and any other property which I may acquire there, the permises Nos. 1, 4, 9, 11, 17, Sreenath Das' Lane, No. 14 Wellington Street, Calcutta, and the Benares house with the furnitures therein as debutter properties." He next provides that the Benares house should remain under the control and supervision of the shebait for the time being, but should be available to all the members of his family, both male and female, for temporary residence and use. The testator then goes on to specify the expenses of the daily worship of the family idols, which, including the Rs. 200 per mensem to be paid to the shebait, amount to Rs. 6,765 per annum. By paragraph 2, clause (1) of the Will the testator directed that if after the Government revenues, rents, cesses, taxes, and the costs for the management and repairs of the above properties had been paid, there was any money left in the hand of the shebait for the time being, the same should accumulate as a debutter fund. The rest of that clause runs as follows:—

"The shebait for the time being shall meet any emergent and unforeseen expenses out of the said fund and shall have power to make any safe investment and to acquire other properties, and thus to increase the corpus of the debutter estate. Out of the income of such fund the shebait for the time being shall have power to celebrate the Puja of any other God or Goddess of the Hindus, to perform any other religious ceremonies, or to perform any other charitable work. The above-mentioned properties and the income thereof, or any portion of the same, shall never belong to any of my heirs or any of the shebait, nor shall the same be in any way liable for his personal debts." It is argued that the expenses specified by the testator would not in ordinary circumstances take up more than half of the net income of the several properties which were made debutter, and that the directions with

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regard to the surplus were void for uncertainty, and therefore that surplus must go to whoever should be entitled to it either by inheritance or by any other disposition in the Will. I cannot accept this construction of the clause. The Court will certainly endeavour to give effect to the testator's intentions as expressed in the Will, unless they are clearly contrary to law.

Now with regard to the bequests for religious and charitable purposes, it seems to me unnecessary to review all the cases again. They have been reviewed in many decisions in this and other Courts. The outcome of them seems to be, that, where a discretion is left to the trustee as to how he shall apply the testator's property, if the discretion allows him to go beyond charitable purposes and to employ the property for some other object then the bequest will be bad. If, however, it is strictly limited to charitable purposes, (and in charitable purposes religious purposes have been included) then it will be a valid bequest, and it will not be the less so because a discretion is left to the executor as to the precise mode of the employment of the fund. For instance if besides charitable purposes, the testator has included purposes of benevolence or education and (as in the case before Mr. Justice Chaudhuri) expenses for the public good, the Court will hold that that is void for uncertainty, because it does not follow that the trustee must necessarily employ the property for charitable purposes. Here, the intention of the testator is plain that if there is any surplus after the expenses of his family idols have been defrayed, then that should be used for celebrating the Puja of any other God or Goddess of the Hindus, performing any other religious ceremonies or any other charitable work. This appears to me to be a strictly charitable bequest, and so I hold. It is unnecessary to consider under these circumstances what would be the effect of an intestacy with regard to the surplus, or who would take it.

The next question is with regard to the bequest contained in paragraphs 2 and 4, who is to pay the taxes and repairs of the premises, No. 14 Williams Lane, Calcutta, dealt with by clause 2, and the premises No. 7 and 8 Guriamas Lane dealt with by clause 4. The clauses provide that his sons, Gnanendra and Debendra, with their wives, and in the case of Gnanendra, the testator's granddaughter, Tilottoma, shall during their respective lives, "occupy and hold possession of the property which shall on their death revert," in the first case to Rajendra and in the second case to Surendra. It is unnecessary for me to say more than that the occupants, Gnanendra or Debendra or the ladies as the case may be,

should pay the taxes and execute the repairs of these premises. It was suggested that the reversioners must bear these expenses because there was no estate given to Gnanendra or Debendra but merely a right of residence, but I think the words are wide enough to indicate a life estate in those persons. Rajendra and Surendra have no immediate right in these premises for any purpose except as subject to the interests of Gnanendra and Debendra. I accordingly hold that whoever may be in possession under these two clauses should pay the rates and taxes of and bear the cost of any repairs.

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The next question is what is meant by the word "*cash*" in clauses 12 and 14. By clause 12 the testator directed that out of the Government Promissory Notes and "*cash*" left by him certain expenses there specified should be met, and, if anything remained after meeting these expenses and after paying the legacies and debts (if any), the same was to be equally divided between his two sons, Surendra and Rajendra. For the plaintiffs it is argued that "*cash*" means actual cash *i.e.* money actually in hand; money lying at the testator's current account at the Bank and money in the tills of the several zemindaries; and that it does not include rents due to the testator, debts due on mortgage, shares in public companies, or property of that description. It was suggested by Mr. Sinha that it might cover practically all movable property, but this I am unable to accept. In the first place, by clause 11, the testator dealt with his movable properties, horses, carriages and furniture etc. that were in the exclusive possession and use of his children, and individual members of his household, and directed that they were to continue in such possession and use. The rest of his movable property consisting of furniture, utensils and other things, he made debutter. That must, I think, clearly refer to furniture, utensils and other things *ejusdem generis*. It cannot possibly refer to other movable property such as the testator's library, shares, mortgage debts and so forth. Returning to clauses 12 and 14, clause 14 appears to me to explain what the testator meant when he spoke of any "*cash*" or Government Promissory Notes. It is perfectly clear he meant "*cash*" in the ordinary meaning of the word *i.e.* ready money, either in the house or lying at the Bank or in the tills of the zemindaries. In that view there is an intestacy with regard to the other movable property consisting of rents, mortgage debts, shares and such like. I need only mention, to pass over, the suggestion which Mr. Chakravarty put forward that mortgage debts were immovable property, and under

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clause 5 should go to Rajendra or his representatives. It is quite plain that the debts due to the testator on mortgages would be regarded as part of his movable property.

The plaintiffs and the executors have suggested that it is necessary to form at once a scheme with regard to the debutter properties. I do not think that that need be done at this stage. The testator's dispositions as contained in clause 1, left everything with regard to the debutter to the sole discretion of the shebait. The first Shebait, Rajendra, is dead, and Surendra's son Jogendra, has recently succeeded to the office. It remains to be seen whether he will properly carry out the trust committed to him or not, but there is no reason at present for supposing that he will not, and it is unnecessary to frame a scheme, if that trust is carried out to the satisfaction of all parties. If there is any reason for proceeding against him in his capacity as trustee, that would more properly form the subject of a separate suit, when the plaintiff, whoever he may be, would be responsible for the costs incurred. There will be an enquiry as to what the movable property of the testator consisted of at the time of his death, other than the movable properties mentioned in clause 11, and the Government Promissory Notes and cash mentioned in clauses 12 and 14. An enquiry will also be made as to who received these monies after the testator's death and how they have been applied. The costs, I think, of all parties may be paid out of the estate. Further consideration and costs will be reserved. Liberty to apply.

*Mr. C. C. Ghose.*—As regards the costs of the shebait, I submit they should be as between attorney and client. He has been made a party in his capacity as shebait.

*Mr. S. R. Das.*—He has come here not as shebait but as executor. If there was any question of a scheme, then he could come in as a shebait.

*Mr. C. C. Ghose.*—It is a question for the shebait. He is challenging the trust and the trustee has got to come in and support the trust.

*The Court.*—If that was so, he would take his costs out of the trust fund. I think that there is this distinction. If it was a case of protecting his own fund, then he would get his cost out of that fund, but here he is going to get them out of the general estate.

*Mr. B. Ghose.*—I submit the same with regard to the costs of Rajendra, who was the late shebait.

*The Court.*—I am doubtful whether the executors of Rajendra should have served their appearance.

*Mr. Dutt.*—I am applying for costs as between attorney and client. I am appearing for the executors of the estate, and my co-executors were Surendra and Rajendra.

*The Court.*—Your co-executor is Surendra only. Why have you served your appearance with Surendra.

*Mr. Dutt.*—Surendra does not appear in the capacity of an executor, but as a beneficiary under the Will.

*The Court.*—If he does not appear as an executor, why should you appear as executor?

*Mr. Dutt.*—There are certain allegations made against us. We have nothing to do with Surendra's written statement.

*The Court.*—Yes, but though you have nothing to do with his written statement, you are executors with him.

*Mr. B. Ghose.*—I appear as Rajendra's representative and I ask for a direction as to the costs which he incurred as representative of Rajendra. There is a conflict of interest between Rajendra in his individual capacity and as shebait. There was a written statement by him as shebait and briefs were delivered, but, when the matter came on for hearing, he died.

*The Court.*—There ought really to be one set of costs for the three executors. Rajendra's executors will get their costs out of the estate as between party and party.

*Mr. B. L. Mitter.*—I submit Surendra should get party and party costs out of the estate.

*The Court.*—Yes.

*Mr. S. R. Das.*—Of course Rajendra and Surendra get party and party costs in so far as they have been incurred in their individual capacity. As regards the costs as executors, there is only one set of costs.

*The Court.*—Yes.

*Mr. B. Ghose.*—With regards to the costs we incurred as executors, that will form part of the general costs out of the estate.

*The Court.*—Yes.

*Mr. Dutt.*—The executors' costs should be as between attorney and client.

*The Court.*—Very well.

*Mr. B. L. Mitter.*—I submit that the Assistant Referee should take the accounts that your Lordship directed.

*The Court.*—Yes.

Against this judgment, appeals were preferred.

*Messrs. N. Sircar and B. K. Ghosh* for the Appellants.

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*Messrs. B. C. Mitter and B. L. Mitter* for the Respondents.  
(Surendra Nath and another)

*Messrs. N. N. Bhose, C. C. Ghose and N. C. Ghose* for the  
Respondent (Shebait Jogendra).

*Messrs. S. R. Dass and H. D. Bose* for the Plaintiff Respondent  
(Gnanendra Nath).

C. A. V.

The judgments of the Court were as follows :

**Sanderson, C. J.**—This appeal raises questions as to the true construction of the Will of Sreenath Das, dated 13th January, 1904.

The first clause deals with a dedication of certain property to the family idols. I do not refer to the details of the clause, as they have been already so fully discussed in the course of the argument and they appear from the Will itself.

It has been argued first of all that this clause does not constitute a complete dedication of all the property to the idols, but merely created a charge on the property in favour of the idols: secondly, that there is no valid trust for religious and charitable purposes with regard to the surplus income arising from the so-called debuttar estate.

I do not give any decision on the first point, viz., whether the clause contains a complete dedication, because it was admitted by the learned counsel for the appellant that if the clause does contain a valid trust of the surplus, if any, for charitable purposes, the first point becomes immaterial, and that it does not matter whether the Will constituted a complete dedication or merely a charge on the property in favour of the idols because the whole of the testator's interest in the property specified in clause 1 would be exhausted.

In my judgment the clause does create a valid trust for religious and charitable purposes.

The ground on which the clause is attacked is as follows: It was argued that the terms of the clause gave to the shebait a power to accumulate the surplus income, which would exist over and above the amount required for the defraying of the expenses specified for the worship of the idols and the management of the properties, to an unlimited extent, and that it imposed no obligation upon the shebait to expend any part of the surplus income. As an instance, it was argued that under the clause it was open to the shebait and his successors to accumulate the surplus income for a 1,000 years or more and that they need never spend any of the surplus income upon religious or charitable purposes. In my judgment this is not a proper or reasonable construction to put on the Will.

The clause relating to accumulation is merely incidental to the

provisions relating to the dedication and management of the property, and in my judgment the intention of the testator can clearly be gathered from the terms of the clause, viz., that a power, and it may be said a necessary and reasonable power, is given to the shebait from time to time in the course of the management of the properties to make safe investment of surplus income and thus increase the debuttar fund, and a direction is necessarily implied that the income not required for the specified expenses, shall be used within a reasonable time and in a reasonable way for other religious ceremonies and other charitable work. It is left to the discretion of the shebait to decide the exact form and the exact time when the income should be so used, but it is contrary to the intention of the testator as expressed in the clause, when read as a whole, that the shebait and his successors should hold up the surplus income and accumulate it for hundreds of years. For this reason, in my judgment, the appeal fails on the points raised in the first clause.

The second point raises the question whether there is an intestacy as to certain of the testator's property which I understand consists of rents uncollected at the testator's death, mortgage debts outstanding at the said date, and shares and securities.

It was argued by the appellant's counsel first of all that an extended meaning must be given to the word *cash* so as to include the property which I have mentioned already.

In my judgment this is not the true construction. Cash in the ordinary acceptance of the word has a narrower meaning than money, and when taken in conjunction with the words "Government promissory notes," in my judgment, it means cash in the ordinary meaning of the word and nothing more.

But a further point is taken, and this, I admit, has caused me some doubt as to the proper construction. It was argued for the appellant, that the terms of the Will read as a whole showed a clear intention of the testator to dispose of the whole of his property. With this I agree. The question remains whether the terms of the Will are sufficient to carry out that intention as to his residuary estate so as to cover the property abovementioned, viz., uncollected rents, mortgage debts and shares. After due consideration of the able argument of Mr. Dass, I have come to the conclusion that clauses 12, 13 and 14 read together do sufficiently contain a devise of the residuary estate to his two sons, Surendra and Rajendra; and consequently, in my opinion, the judgment of Mr. Justice Chitty, in so far as he held there was an intestacy as to this property, should

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be reversed. As to the Library at Srinath Das' Lane, I think it may be said to be included in clause II.

Costs of the appeal to come out of the estate. Executor's costs as between attorney and client.

**Woodroffe, J.**—I agree.

**Mookerjee, J.**—Two questions have been argued on these appeals, namely, *first*, was there intestacy in respect of any interest in the properties dedicated by the testator to his family idols; *secondly*,<sup>1</sup> were the two sons of the testator, Surendra Nath Das and Rajendra Nath Das, constituted residuary legatees under his Will, in respect of properties other than his immovable properties.

The determination of the first question depends upon the true construction of the first clause of the Will. In the first paragraph of that clause, the testator dedicates certain specified properties to his family idols and directs the performance of the ceremonies named by him. He further prescribes the sums to be spent for this purpose, which amount to an aggregate of Rs. 6,765 a year. In the second paragraph, he directs the revenues, rents, cesses, taxes and costs of management and repairs of the dedicated properties to be paid out of the income thereof, and then states as follows: "if after defraying all the abovementioned expenses any money be left in the hands of the shebait for the time being, the same shall accumulate as a debuttar fund. The shebait for the time being shall meet any emergent and unforeseen expenses out of the said fund and shall have power to make any safe investment and to acquire other properties and thus to increase the corpus of the debuttar estate. Out of the income of such fund, the shebait for the time being shall also have power to celebrate the Puja of any other God or Goddess of the Hindus, to perform any other religious ceremonies, or to perform any other charitable work. The abovementioned properties and the income thereof or any portion of the same shall never belong to any of my heirs or any of the shebait's nor shall the same be in any way liable for his personal debts." The appellants have contended that the properties mentioned in the clause were not absolutely dedicated to the family idols, that they continued to be secular properties subject to a religious charge of Rs. 6,765 a year, and that there was no valid legal disposition of the remainder, so that there was an intestacy in respect thereof. This contention is, in my opinion, unsound. Reliance has been placed upon the decisions of the Judicial Committee in *Sinaton v. Juggutssoondree* (1), *Ashutosh*

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v. *Durgacharan* (1), and *Surendrakeshab v Durgasundari* (2). These cases are clearly distinguishable, and do not assist the contention of the appellants. The dispositions there provided for the performance of religious acts and ceremonies, and were followed by a bequest of the surplus to the members of the family of the founder for their own use and benefit ; in these circumstances, it was ruled that the dedication was not, to use the language of Sir Arthur Wilson in *Jagadindra v. Hemanta Kumari* (3), of the completest character, but merely created a charge for religious and ceremonial purposes on property which still retained an essentially secular character. Here the position is entirely different. The testator clearly intended to dedicate his entire interest in the property for religious and charitable purposes. He states explicitly that no portion of the income of the properties shall ever belong to any of his heirs or be in any way liable for their personal debts. I am not unmindful that an expression of this character is not necessarily decisive, for, as Peacock, C. J. said in *Tagore v. Tagore* (4), a mere expression in a will that the heir-at-law shall not take any part of the testator's estate is not sufficient to disinherit him, without a valid gift of the estate to some one else, or as Willes, J. said in *Tagore v. Tagore* (5), the heir-at-law, though in terms excluded from benefit under the will, cannot be excluded from his general right of inheritance, without a valid devise to some other person ; this is in conformity with *Pickering v. Lord Stamford* (6), *Johnson v. Johnson* (7) and *Fitt v. Waber* (8). The clause mentioned, however, plainly indicates the intention of the testator, and even if it be assumed that the entire interest in the properties was not dedicated to the family idols, there is no room for dispute that the remainder was dedicated for religious and charitable purposes. This brings me to the question, whether, in this view, the supplementary dedication was valid in law, and, if invalid, whether the heirs are benefited thereby. The appellants have argued that there was a direction for accumulation not permissible under the law. I do not think this is a fair construction of the devise. The testator authorised an accumulation of the surplus and an increase of the corpus of the debuttar estate ; but he em-

(1) (1879) L. R. 6 I. A. 182 ; I. L. R. 5 Calc. 438.

(2) (1892) L. R. 19 I. A. 108 ; I. L. R. 19 Calc. 513.

(3) (1904) I. L. R. 32 Calc. 129 ; L. R. 31 I. A. 203.

(4) (1869) 4 B. L. R. O. C. J. 103 (187.)

(5) (1872) L. R. I. A. Sup. Vol. 47 (79) ; 9 B. L. R. 377.

(6) (1797) 3 Ves. 332.

(7) (1841) 4 Beav. 318.

(8) (1848) 6 Hare. 145.



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powered the shebait to apply the income for religious and charitable purposes and his intention obviously was that it should be so applied. It has been argued, however, that under the words of the will, it was not obligatory on the shebait to apply the income in this manner, that he might accumulate the income for an indefinite time, and that consequently the direction for accumulation is void. Reliance has been placed in this connection upon a class of cases of which *Williams v. Kershaw* (1), *Hunter v. A. G.* (2), *Blair v. Duncan* (3) and *Grimond v. Grimond* (4) may be taken as the type. The principle which underlies these decisions does not assist the appellants; there, the bequests were for charitable and for other indefinite purposes, and were, consequently, held void for uncertainty, as the trustees might or might not apply the fund for a charitable purpose; here, on the other hand, the income, if spent at all, must be spent for religious and charitable purposes. Further, I do not accept the contention that this is a case of a mere power; it is, on the other hand, I think, to use the language of Lord Eldon in *Brown v. Higgs* (5), a case of a power which the party to whom it is given is entrusted with and required to execute. But even if we assume that the shebait is authorised by the clause to accumulate the income indefinitely and that such direction is invalid in law, how does it help the appellants? It is well-settled that where there is an unconditional gift to charity, a direction for accumulation is invalid, but the only result is that the income is immediately distributable in charity; the heirs or next of kin are not let in. This was decided by the House of Lords in *Wharton v. Masterman* (6), which overrules the contrary view expressed by Wickens, V. C. in *Harbin v. Masterman* (7). Reference may also be made to a long line of cases which support the view I take: *Martin v. Maugham* (8); *A. G. v. Poulden* (9); *Shillington v. Portadown Council* (10); *Ogilvie v. Kirk of Dundee* (11); *Maxwell v. Maxwell* (12); *Chamberlayne v. Brockett* (13); *Re Swain* (14). The decision in *Even v. Bannerman* (15), may seem at first sight to support the opposite view; but it has been adversely commented on and plainly disapproved by

(1) (1835) 5 Cl. and Fin. 111.

(2) (1899) App. Cas. 309.

(3) (1902) App. Cas. 37.

(4) (1905) App. Cas. 124.

(5) (1803) 8 Ves. 561 (570.)

(6) (1895) App. Cas. 186.

(7) (1871) L. R. 12 Eq. 559.

(8) (1844) 14 Sim. 230.

(9) (1844) 3 Hare. 555.

(10) (1911) 1 I. R. 247.

(11) (1846) 8 Dunlop. 1229.

(12) (1877) 5 Rett. 248; 15 S. L. R. 155.

(13) (1872) L. R. 8 Ch. App. 206.

(14) (1905) 1 Ch. 669.

(15) (1830) 2 Dow. & Cl. 74; 4 Wils. & Sh. 346.

Lord Chelmsford and Lord Wensleydale in *Magistrates of Dundee v. Morris* (1). There is no room for reasonable doubt that the doctrine recognised by the House of Lords in *Wharton v. Masterman* (2) is based on sound principle ; the trustees of a charity are not bound to spend the whole of the income of the charity every year ; they can lay by money for an ulterior purpose just as an individual can, provided the purpose is within the scope of the charitable trust : See the observations of Lord Dunedin in *Lindsay's Trustees* (3). Consequently, even if the clause were construed as a trust for accumulation, and the direction were held invalid in law, the heirs would not be benefited. The first question must be answered in the negative.

The determination of the second question depends upon the true construction of the last three clauses of the Will. I am disposed to agree with Mr. Justice Chitty that the term 'cash,' used by the testator in clause 12, does not include arrears of rent, debts due and the like properties. But Mr. Mitter has argued that the two sons, Surendra Nath Das and Rajendra Nath Das, were constituted residuary legatees. This contention, I think, must prevail, notwithstanding the able argument of Mr. Das in support of the contrary view. The various dispositions contained in the Will, taken together, point to the conclusion that the testator intended to dispose of all his properties ; if there is any doubt, we ought if possible to read the Will so as to lead to a testacy, not to an intestacy : *In re Redfern* (4); *In re Harrison* (5) ; *Kirby Smith v. Parnell* (6) ; *In re Edwards* (7). On an examination of the entire scheme of the Will I think it is reasonably plain that clause 5 disposes of the residue of the immovable properties, while the last sentence of clause 12 effectively disposes of the residue of the other properties. This view is to my mind supported by the dispositions in clause 14 ; it would be unreasonable to hold that in the contingency contemplated in that clause, the testator burdened his two sons Surendra and Rajendra with the funeral expenses, the costs of the probate proceedings and the legacies though they were not the residuary legatees. The second question must be answered in the affirmative.

On these grounds, I agree with the learned Chief Justice in the order he proposes to make in these appeals.

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(1) (1858) 3 Macqueen H. L. 134 (154, 174).

(2) (1895) App. Cas. 186.

(3) (1911) 48 Scot. L. R. 470.

(4) (1877) 6 Ch. D. 133 (136.)

(5) (1885) 30 Ch. D. 390 (393.)

(6) (1903) 1 Ch. 483 (489.)

(7) (1906) 1 Ch. 570.

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In No. 25.

*Babu Birendra Nath Mitra*—Attorney for the Appellant.*Messrs. G. C. Chunder & Co., Mr. N. C. Ghosh, Babus R. L. Mukerji and N. B. Sircar*—Attorneys for the Respondents.

In No. 27.

*Mr. A. C. Ghose*—Attorney for the Appellants.*Messrs. G. C. Chunder & Co., Babus Birendra Nath Mitra, R. L. Mukerji and N. B. Sircar*—Attorneys for the Respondents.

A. T. M.

*Decree modified.*

*Before Sir Lancelot Sanderson, Knight, K. C., Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.*

A. K. A. KHAN GHUZNAVI

v.

NATIONAL BANK OF INDIA L.D.\*

CIVIL.

1916.

January, 4.

1915.

December, 15, 16.

*Surety—Liability, discharge of—Dealings, prejudicial—Contract Act (IX of 1872), secs. 133, 139—Guarantor, if can control appropriation—New account, when to be opened—Departure from rule of appropriation—Agreement between principals with reference to contract guaranteed—Detention of money—Interest, liability to pay, after date of agreement.*

*Per Sanderson C. J.* : The rule in *Clayton's case* (1) applies only to the items in one current account and when there is no specific appropriation of the debtor.

Under section 139 of the Contract Act, in order to discharge the surety, it must be shown that not only has the creditor omitted to do some act which his duty to the surety required him to do, but also that the eventual remedy of the surety himself has thereby been impaired.

A guarantor entered into an agreement with the Bank to the effect that he would pay to the latter on the 30th September, 1913, to the extent of Rs. 3,00,000, all money then due from B on current account or otherwise howsoever, including all interest, charges and other expenses, which he might charge against B :

*Held*, under the circumstances of the case, that the Bank could claim interest at the rate agreed upon between them and the debtor before the closing of the contract.

*Held* also by *Woodroffe and Mookerjee JJ.* : that the Bank could claim interest by way of damages for the detention of the money due to them at the rate agreed upon between them and the debtor before the closing of the contract.

\* Appeal from Original Decree No. 58 of 1915, against the decree of Mr. Justice Chaudhuri, sitting on the Original Side, dated the 11th June, 1915.

(1) (1816) 1 Mer. 572.

*Lala Chhajmal v. Brij Bhukhan* (1) ; *Mohamaya v. Ram Khelawan* (2) and *Ranjiban v. Dhikhu* (3) referred to.

*Per Mookerjee J.* : In the absence of special agreement, a guarantor has no right to control the appropriation, by customer or banker of moneys paid in, subject to the qualification that the banker is bound to deal with the accounts in the ordinary way of business.

*Kirby v. Marborough* (4) and *Lysaght v. Walker* (5) referred to.

Thus, payments in may be appropriated to a pre-existing debt which is not covered by the security and of which the surety had no knowledge.

*Williams v. Rowlinson* (6) referred to.

On the termination of the guarantee, the account may be closed and a new one opened to which all payments in may be carried, though the banker is not entitled, where an account is guaranteed to a limited extent, to split that account during the continuance of that guarantee and attribute all payments in to the insured balance.

*Bechevaise v. Lewis* (7) and *Exp. Hanson* (8) referred to.

So long as an account is unbroken, a surety should not be prejudiced by any departure from the rule of appropriation of items in order of date (*Clayton's case*) unless his consent to such departure is expressed or can be implied from the character of his engagement.

*Cory Brothers v. Mecca* (9) referred to.

It is contrary to ordinary business and good faith to open a new account during the currency of the guaranteed one and carry all payments in to the new account.

If there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and if there is any alteration, which is not obviously either unsubstantial or for the benefit of the surety, he is to be the sole judge whether he will remain liable.

Appeal by the Defendant.

Suit for recovery of money.

The material facts appear from the judgment of Mr. Justice Chaudhuri, which is as follows :

**Chaudhuri, J.**—This is a suit for the recovery of a sum of Rs. 25,454.12.9 from the defendant on the following allegations:—that the defendant's brother carried on a jute baling business in Calcutta under the name of A. H. Ghuznavi & Co., hereinafter called the firm ; that there was an agreement between the plaintiff Bank and the said firm, prior to the 10th June, 1913 ; that the Bank would allow the firm to overdraw its account on the usual banking terms ; that the Bank would charge interest on the monies so overdrawn at the rate of 1 per cent per annum over Bank rate with minimum of 5 per

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(1) (1895) L. R. 22 I. A. 199 ; I. L. R. 17 All. 511.

(2) (1911) 15 C. L. J. 684.

(4) (1813) 2 M. & S. 18.

(6) (1825) 3 Bing. 71.

(8) (1811) 18 Ves. 232.

(3) (1912) 16 C. L. J. 264 (270).

(5) (1831) 5 Bligh N. S. 1.

(7) (1872) L. R. 7 C. P. 372.

(9) (1897) A. C. 286 (295).

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cent ; that a large sum of money thus became due to the Bank from the firm and the Bank wanted further security. It was then that the present defendant stood surety for his said brother and wrote a letter to the Bank to the following effect :—"In consideration of your having agreed at my request to extend the time for payment of the moneys overdrawn by Messrs. A. H. Ghuznavi & Co. upon their current account with you, I, the undersigned Abdul Karim Abu Ahmed Khan Ghuznavi hereby agree with you as follows :—

(1) I will pay to you on the 30th September 1913, to the extent of Rs. 3,00,000 all money then due to you from Messrs. A. H. Ghuznavi & Co. on current account or otherwise howsoever including all interest, charges and other expenses which you may charge against Messrs. A. H. Ghuznavi & Co.

(2) No possession of any guarantee from any other person or of any other security shall determine, prejudice or lessen my liability hereunder."

The date for payment was the 30th September 1913. On that date the overdraft account of the firm amounted to Rs. 86,343-5. The Bank alleges that since that date the firm made sundry payments in reduction of the amount, and, at the time of suit, the sum of Rs. 25,454-12-9 was due from the firm and the Bank has instituted this suit against the defendant on the basis of the letter above quoted.

The defendant in his written statement, amongst other things, states that he has no knowledge of the correctness of the account and apparently does not admit the arrangement about interest, and in the 5th paragraph of his written statement says that he does not know how the amount claimed has been arrived at. He believes that since the 30th September 1913, his brother A. H. Ghuznavi paid in large sums of money to the plaintiff Bank and the plaintiff Bank allowed him to draw out from the plaintiff Bank also "large sums of money," that is to say, considerably in excess of the claim in this suit without the knowledge and consent of the defendant, and he submits that, under the circumstances, his guarantee was discharged. He further submits that in the event of the Court holding that the guarantee was not discharged, an account should be taken by the Court of what is due.

How the letter came to be written appears from the evidence of Mr. Stewart, who is now the acting manager of the Bank at Rangoon and who was at the time of the transactions in Calcutta as Sub-Manager, that during the continuance of the business between the Bank and the firm the bank discovered that certain securities

which had been put in by A. H. Ghuznavi were spurious, and that a large overdraft was unsecured. The Bank thereupon required him to supply further security. The securities that he had already pledged to the Bank were quite insufficient to secure the amount due from him. He then suggested that his brother, the present defendant, would give a guarantee. After that he saw the defendant who had several interviews with the manager and as the result of such interviews wrote the letter above referred to. He says that the defendant wanted his brother to continue his business and requested the Bank not to foreclose and he held himself responsible to the Bank, should the Bank allow his brother to continue. He also says that, on the 16th October 1913, he saw A. H. Ghuznavi the defendant's brother who called at the Bank and proposed to open a new account to enable him to continue his business. He said he had Rs. 20,000 which he wished to deposit with the bank, provided the Bank would allow him to withdraw it by cheques, "that is to say not to take the amount in payment of the amount then due by him to the Bank." The Bank thereupon agreed to open a new account which they called account No. 2, which was to be kept separate from the guaranteed account, namely, the current account which was numbered as No. 1. The Bank then took the money and it was stipulated between A. H. Ghuznavi and the Bank that any profits on the baling business which he wanted to continue, and arising out of the new account started, should be paid to the credit of No. 1 account. He said that the Bank took his word for the actual amount of profit and such profits were paid from No. 2 account to No. 1 account, in part liquidation of the amount due on that account. This reduced the balance of the debt due and the suit is to recover such balance. Learned counsel appearing for the defendant did not argue that there was any variation of the contract under section 133, or that there was any discharge by operation of section 134 of the Contract Act, but that this was a case covered by section 139 of the Contract Act, which provides that if the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired the surety is discharged. I have referred to paragraph 5 of the written statement, which does not specifically make this case. It is not submitted in the written statement that any duty was cast upon the Bank to give information to the defendant that after the date of the letter and the period stipulated for payment the defendant's

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brother was allowed to operate against a new account and that in consequence the remedy of the surety against the principal debtor had been impaired. It was urged that it was the duty of the Bank to give such information to the guarantor, that the defendant should have been told that some money had been brought in by his brother, which he was utilizing for his business because, if that had been done, the defendant might have proceeded to attach that sum by way of attachment before judgment; and inasmuch as such information was not given to him the defendant could not take any steps to see that the amount, which was so brought into the Bank was applied for the discharge of the guaranteed amount. It is not the defendant's case that there was any such agreement between the parties express or implied, but it is broadly put on the basis that it is the creditor's duty to inform the surety of all other money transactions between the creditor and the principal debtor. It was conceded that the Bank could not lawfully appropriate all sums whatsoever brought in by the principal debtor towards the guaranteed debt. There is no evidence of any agreement, not even a suggestion of an agreement, that the plaintiff Bank undertook at any time to apply all monies brought into the Bank, after the letter of guarantee, in discharge of the guaranteed amount. What I am asked to hold is, that by a separate account being opened and kept separate from the guaranteed amount the surety has been discharged, although the transactions have enured for the defendant's benefit. In support of this proposition I have been referred to several English cases, amongst them the case of *Rees v. Berrington* (1). The following rule was laid down by Lord Loughborough: "It is the clearest and most evident equity not to carry on any transaction without the knowledge of him (the surety) who must, necessarily, have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him." The case of *Holme v. Brunskill* (2) has also been referred to and the following passage from the judgment of Cotton L. J. has been relied upon (see page 505). "The true rule, in my opinion, is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without enquiry evident that the alteration is unsubstantial or that it cannot be otherwise than beneficial to

(1) (1795) 2 Ves. Jun. 540.

(2) (1878) 3 Q. B. D. 495.

the surety, the surety may not be discharged; yet that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not in an action against the surety, go into an enquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration, or, into the question whether it is to the prejudice of the surety but will hold that in such a case the surety himself must be the sole Judge, whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented, he will be discharged." It is not suggested in this case that there was any alteration of the agreement. One finds guidance in interpreting section 139 from the case of *Pogose v. The Bank of Bengal* (1) where *Rees v. Berrington* (2) was amongst other cases discussed. It is pointed out that the section in the Contract Act is somewhat different from the English law. It differs in this respect, that under this section, before the act of the creditor can operate as a discharge, it is necessary to look further and see whether by that act the eventful remedy of the surety against the principal is impaired. See Sir Richard Garth's judgment, page 188; section 139 practically reproduces the rule laid down in *Watts v. Shuttleworth* (3). The substantial question in this case is whether the omission to inform the defendant discharges the defendant, the surety. The test seems to be that if the person guaranteed does any act injurious to the surety or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged. See Story's Equity Jurisprudence, section 325. In this case there was no arrangement or agreement, express or implied, that the plaintiff Bank was to appropriate all monies brought into the Bank by the principal debtor. The two accounts, as I have stated, were kept separate. The Bank allowed A. H. Ghuznavi to carry on his business as requested by the guarantor, the defendant. In order to enable him to carry on the business they opened a separate account with another sum of money which was brought in. It was placed with them for a particular purpose. I do not see how section 139 discharges the surety under these circumstances. Supposing the Bank had two accounts originally, and suppose the amount due on one account was guaranteed. Suppose next that the principal debtor brought in some money without specifying to what account the sum was to be credited and suppose that the Bank proceeded to

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(1) (1877) I. L. R. 3 Calc. 174.

(2) (1795) 2 Ves. Jun. 540.

(3) (1860) 5 H &amp; N. 235 (247).



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credit the amount so received from the principal debtor for the unsecured and unguaranteed account, could it have been said that by that the surety had been discharged. This, I take it, is a stronger case than the one before me. It has been held in England in a similar case that would not operate as a discharge : *In re Sherry, London and County Banking Co. v. Terry* (1). It is quite clear here that the account which was guaranteed was the current account mentioned in the letter and I hold that the surety in this instance has not been discharged by the Bank having opened a separate account and by having stipulated to allow the defendant's brother to operate thereon and to apply the profits arising out of the transaction, in payment of the guaranteed amount.

The next point is as regards the account. The defendant does not admit its correctness, and has submitted that there should be a reference for the purpose of ascertaining the correctness of that account. There is also the question of interest. It is quite clear from the account which was submitted to the defendant that interest was included. It is also quite clear from the correspondence that the defendant was repeatedly asked to pay same.

Under the circumstances I take it that he must have been aware that interest was being charged upon the overdraft account. That is the usual course of banking business. The next point is, as to whether defendant had been told what the amount claimed was and had any account been submitted to him. It is quite clear from the correspondence that accounts were sent to him from time to time and he never disputed the correctness of the accounts. There is a letter, amongst others, from the defendant to the manager of the plaintiff Bank, dated 22nd March, 1914, in which the defendant asked for a detailed account of the affairs of his brother from June 1913 up to that date. There is a reply from the manager on the 23rd March 1914, stating that the account asked for was sent shewing a balance of Rs. 24, 948-9-9 still due. There is some considerable correspondence thereafter in which no question was asked about the correctness of the account and the evidence of Mr. Stewart is that whenever the defendant came to the Bank, accounts were shewn to him. They discussed the accounts. From the cross-examination of Mr. Stewart it appears that whenever any explanations were asked for in respect of the accounts such explanations were given. But the main ground of attack has been with regard to two sums of money £5,000 and £2,000 remitted from the Head office of the National Bank in England to the Calcutta Branch. I gather from the cross-interrogatories

administered to Mr. Stewart, that the defendant wanted to know the particulars of the transaction which resulted in these two sums being sent to Calcutta by the Head office to the Calcutta Bank to be credited in favour of the principal debtor. Accounts of these transactions were sent to the principal debtor. What the Calcutta National Bank had to do was to credit the amount advised by the Head office, and they did so. It is not shewn that the National Bank here was in any manner responsible for the sales, or the transaction, in respect of which these amounts became receivable by the principal debtor. But I find that particulars relating to the transaction were given in two letters, a letter from Mr. Stewart, dated the 10th July 1913, with a further letter dated the 14th August 1913 from same to same. There is also a letter dated the 29th September 1913 from the Manager to the defendant in these terms: "We have received a cable from London advising that all the jute has been sold and our Head office have remitted £ 1,386 being the balance of the proceeds which will be passed to the credit of your brother's account". If there was any desire to look into these accounts, the defendant could have easily looked into them, but he apparently did not choose to do so. Under the circumstances I am unable to reopen the matter, after this lapse of time, also having regard to the fact that the accounts of the Bank were sent to him and that almost weekly intimation of how the account as it stood between the Bank and his brother was being sent to the guarantor, and also having regard to the fact that although considerable time had elapsed and great consideration was shewn by the Bank, nothing was done to meet with their requisitions. Finally I want to refer to a letter from the defendant to the Bank dated the 3rd April 1914 in which he says "I still assure you that I shall see that what is now owing to you from my brother is fully paid up." This refers to the amount claimed in this suit. Then the defendant in his letter of the 7th June 1914 says that he has already fully explained to the Bank that unless they show some further consideration towards his brother, it is not possible for him to repay them the balance all at once, placed as he is in unexpected difficulties. He further proceeds to say that the threatened suit will mean delay, as expeditious remedy cannot be obtained by going to law Courts. He asked that further consideration should be shewn to his brother who had agreed to make further payments in repayment of the debt and who had promised to make weekly payments. The letter then proceeds:—"The whole thing really depends on his being able to proceed with his business during the

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coming season. I hear he has already been able to make such arrangements. As soon as he starts his new business, which he hopes to do by the 15th July as arrangements are almost complete, he will be able to make you substantial payments. At any rate you could wait till August to see whether his expectations turn out to be correct, if in the mean time he goes on making you some payments." On the 11th June the Bank intimated that his brother had paid Rs. 1,000 but had not been to the Bank for three or four weeks. It is clear from the evidence that the Bank was willing to shew every indulgence but finally finding that nothing was being done their forbearance and belief in his promises were exhausted, and then they instituted this suit. Taking all the circumstances into consideration, I think no case has been made out on behalf of the defendant, and I, therefore, decree the suit for the amount claimed with usual interest and costs on Scale No. II, including the costs of the *de-bene-esse* examination.

Against this judgment, the defendant appealed.

*Messrs. Langford James and N. Sircar* for the Appellant.

*Messrs. Aveloom and Pankridge* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

January, 4.

**Sanderson, C. J.**—This was an action by the Bank for the recovery of Rs. 25,454-12-9 alleged to be due from the defendant A. K. Ghuznavi upon a contract in writing dated the 10th June 1913.

It appears that the defendant's brother A. H. Ghuznavi, trading under the name of A. H. Ghuznavi & Co., as jute bailer and shipper, had an account at the Bank : advances were made by the Bank to A. H. Ghuznavi & Co., against shipping documents in relation to jute in course of shipment : the form of overdraft being known here as 'advances against shipping lien,' the rate of interest charged being 1 per cent. over Bank of Bengal rate with a minimum of 5 per cent.

During the course of business it was discovered that certain Dock receipts and Bills of Lading, which had been handed to the Bank by A. H. Ghuznavi & Co., were spurious, and consequently a considerable amount of the overdraft was unsecured.

Certain securities were pledged with the Bank by A. K. Ghuznavi & Co., but they were insufficient to cover the amount due and the Bank called for additional security.

The result was that after certain interviews between the Bank and the defendant, the defendant gave the Bank a letter which was to the following effect :—"In consideration of your having agreed at my

request to extend the time for payment of moneys overdrawn by Messrs. A. H. Ghuznavi & Co., upon their current account with you I the undersigned A. K. A. K. Ghuznavi hereby agree with you as follows :—"I will pay to you on the 30th September 1913 to the extent of Rs. 300,000—all money then due to you from Messrs. A. H. Ghuznavi & Co., on current account or otherwise howsoever including all interest charges and other expenses which you may charge against Messrs. A. H. Ghuznavi & Co.

No possession of any guarantee from any other person or of any other security shall determine, prejudice or lessen my liability hereunder."

Between the 10th June 1913 and 30th September 1913, the date specified for payment in the letter, memoranda showing the state of the account were frequently sent to the defendant, and, according to the evidence of Mr. Stewart, who was at that time sub-manager of the Calcutta Branch of the Bank and whose evidence is uncontradicted, the defendant was in the habit of calling on the Bank whenever he was in Calcutta during that period and seeing Mr. Stewart, he asked the Bank not to press his brother or to foreclose, and he wanted his brother to continue doing his business.

On the 10th June 1913 the overdraft was Rs. 5,41,653-2-0, and on the 30th September 1913 the overdraft including interest was Rs. 86,343-5-0 During the abovementioned period the account had not been drawn upon by A. H. Ghuznavi & Co., but the overdraft had been reduced by payments by A. H. Ghuznavi & Co., and by crediting to the account the proceeds of sales of the securities lodged with the Bank.

Mr. Stewart did not see the defendant after the 30th September, 1913, and it appears that he learnt from the newspapers that the defendant had gone to Mecca and that he did not return to Calcutta until February 1914.

On October 16th, 1913, A. H. Ghuznavi went to the Bank and wanted to open an account to enable him to continue his business. He had Rs. 20,000 which he wished to deposit provided the Bank would allow him to draw against this sum by cheques: that is to say, the Bank were not to take it in payment of the amount due to them.

Consequently a No. 2 account was opened by the Bank to enable A. H. Ghuznavi & Co. to continue his bailing business, the Bank stipulating that any profits on such business should be paid to the credit of the overdrawn account, and agreeing to take A. H. Ghuznavi's word for the actual amount of profits.

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Apparently A. H. Ghuznavi continued his business and No. 2 account was used, as far as it can be seen from the evidence, as a current operative account from the 16th October, 1913 until the end of the year in the ordinary course of business.

Certain sums were transferred from the No. 2 account to No. 1 account purporting to be profits of the business according to the statement of A. H. Ghuznavi & Co.

Such payments reduced the balance on the over-drawn account.

As far as Mr. Stewart could say, the defendant was not aware of this arrangement made between the Bank and A. H. Ghuznavi.

On December 31st, 1913, there was standing to the credit of A. H. Ghuznavi & Co. on the No. 2 account Rs. 40-13-2 only, and for all practical purposes, as far as this case is concerned, that account may be said to have come to an end shortly afterwards.

Subsequently the Bank claimed from the defendant payment of the balance on the over-drawn No. 1 account and a copy of the account of A. H. Ghuznavi & Co. was at the request of the defendant sent to him. This appears from the letter of the 23rd March 1914, so that an examination of the account in March 1914 must have shown the defendant that a No. 2 account had been in existence in November and December 1913 and that considerable sums of money had been transferred from such account to the over-drawn account.

In spite of this the defendant in his letters of April and June 1914 to the Bank did not dispute his liability, but on the contrary assured the Bank that he would see that what was owing from his brother should be fully paid.

The defendant now alleges that his position was that of a surety and that in consequence of the arrangement made by the Bank with A. H. Ghuznavi & Co. in October 1913 and their subsequent transactions with him, he, the defendant, has been discharged from his liability to the Bank.

The points urged before this Court were that the matter was governed by section 139 of the Contract Act which runs as follows : " If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged."

The first ground was that it was to be implied from the letter of 10th June 1913 and the way in which the Bank dealt with the over-drawn account that A. H. Ghuznavi was to pay off his overdraft,

and consequently the Bank were acting contrary to such implied agreement when they allowed A. H. Ghuznavi to use the Rs. 20,000 for opening the No. 2 account and to draw against it instead of applying it for the payment of overdraft on the No. 1 account, and that consequently the Bank had done an act inconsistent with the rights of the surety within the meaning of section 139 of the Contract Act.

In my judgment that argument will not assist the defendant.

The answer to it is that it was not within the power of the Bank to appropriate that sum to the over-drawn account: A. H. Ghuznavi, as I read the evidence, would only deposit the sum on the condition that the No. 2 account was opened and he was allowed to draw against it for the purpose of continuing his business: and the Bank, if they took that money at all, could only take it on that condition, and could not appropriate it to the overdraft on the No. 1 account.

It was further argued, though not very strenuously, by learned counsel for the defendant that the two accounts should be treated as one account and that if that course were adopted, and inasmuch as some Rs. 60,000 had been paid into the said account in October 1913, the overdraft now sued for would have been wiped off by such payments, and reliance being placed upon the rule in *Clayton's case* (1).

The answer to that argument is, that the rule in *Clayton's case* (1) applies only to the items in one current account and when there is no specific appropriation by the debtor. In this case there was in fact a specific appropriation by A. H. Ghuznavi when he insisted on a new account being opened with the Rs. 20,000 and his being allowed to draw against that sum: and there were in fact not one account, but two accounts.

The main ground, however, which was relied upon was that it was the duty of the Bank to the defendant to inform him of the transaction between the Bank and the defendant's brother in October 1913, and, inasmuch as they did not do so, the defendant is released, and reliance was placed upon the cases of *Polak v. Everett* (2) and *Holme v. Brunskill* (3), and *Rees v. Berrington* (4).

In my judgment in this case there was no duty to communicate with the defendant with reference to the opening of the No. 2 account in October. In my opinion this was not contrary to the nature of the defendant's engagement, to use the words of Lord Lough-

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(1) (1816) 1 Mer. 572.

(2) (1876) 1 Q. B. D. 669.

(3) (1878) 3 Q.B. D. 495 (505).

(4) (1795) 2 Ves. Jun. 540.

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borough : on the contrary I think it is clear from the evidence that it was in accordance with the arrangement made by the defendant with the Bank : In his interviews during the period between June and September 1913 he had expressed his wish that his brother should be allowed to continue his business, obviously in the hope that by so doing A. H. Ghuznavi would be able to pay his debt to the Bank and that the defendant would not be called upon in respect thereof.

I do not see how the defendant's brother, having regard to the nature of his business, could continue his business without having a banking account upon which he could draw in the ordinary course of his business, and, when the defendant intimated that he wished his brother to be allowed to continue his business, he must have contemplated some such arrangement as was in fact made by the Bank, and, therefore, it may be said that he impliedly consented to such an arrangement being made.

It was argued by Mr. Langford James that having regard to the letter of 10th June, 1913 and the way in which No. 1 account was treated by the Bank, that the "carrying on of business" contemplated by the defendant was merely the realising of the securities held by the Bank and the receiving of payments from the debtor for the liquidation of his debt ; but this to my mind is an unreasonable inference to draw from the uncontradicted evidence of Mr. Stewart, and it was evidently not so understood by the Bank.

This would be alone sufficient to decide the case on this point against the defendant, but it must be remembered that under section 139 of the Contract Act of 1872 in order to discharge the surety it must be shown that not only has the creditor omitted to do some act which his duty to the surety required him to do, but also that the eventual remedy of the surety himself has thereby been impaired.

Even if my judgment on the abovementioned matter is not correct, I do not think that it has been shown in this case that the eventual remedy of the defendant against his brother has been impaired, and, therefore, in my judgment this part of the defence fails and the learned Judge's judgment should be upheld.

The next point argued was that interest after the 30th September, 1913 could not be recovered. Upon this point it is necessary to see how the matter stands upon the correspondence between the parties.

By the letter of 10th June, 1913, the defendant agreed "to pay

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to the Bank on the 30th September, 1913 to the extent of Rs. 3,00,000—all money then due from A. K. Ghuznavi & Co., on current account or otherwise, including all interest, charges and other expenses which you may charge against A. H. Ghuznavi & Co." The rate charged upon the account was 1 per cent. over Bank of Bengal rate with a minimum of 5 per cent.

After September 30th correspondence passed, the Bank on one side asking the defendant for payment and the defendant asking for time.

On the 30th September 1913 the Manager of the Bank wrote as follows :—

"We beg to advise that after crediting the proceeds of £1,386 remittance from London of which we informed you privately yesterday, the account of Messrs. A. H. Ghuznavi & Co., after adding interest to date, is Dr. Rs. 86,343-5. In terms of your guarantee, dated 10th June, 1913 we shall be glad to receive payment of this amount to-day."

On the 1st of October he wrote again reminding the defendant of that fact and asking for payment.

On the 26th of February the Bank again wrote setting out the amount that was due and saying that Mr. A. H. Ghuznavi had apparently come to the end of his resources and they were unable to obtain payment from him, and then wrote saying, "All the shares in our hands have been sold with the exception of 50 Dunbar Mills ordinary shares and 22 Goosery Mills ordinary shares which are practically worthless, and we must therefore ask you to pay us the amount due with interest to date in terms of your guarantee."

On the 5th of March the Bank again wrote asking for payment, saying, "As we have received no reply, we presume you have not received our letter and beg to enclose a copy thereof. Nothing further has been paid to the account of Messrs. A. H. Ghuznavi & Co., and we shall therefore be glad if you will send us a remittance in liquidation of the account in terms of your guarantee."

On the 21st the Bank again wrote saying, "The settlement of the account is a matter of the utmost importance and we must ask you to give it your immediate attention. Failing a prompt settlement, it will be necessary for us to place the matters in the hands of the Bank's solicitors."

On the 23rd they wrote again saying, "As desired in your letter of the 22nd instant, we beg to hand you herewith a copy of the firm's account from June last to date showing a balance of



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Rs. 24,958-9-9 still due to us exclusive of interest from 1st January 1914." This to my mind clearly shows that the Bank were charging interest upon the account.

On the 4th of April the defendant wrote a letter to which I have already referred. In the Paper-book it was dated the 4th of March : It was agreed that it was the 4th of April. This is a long letter which I do not intend to read all through. Towards the end of it he said "When I still assure you that I shall see that what is now owing to you from my brother is fully paid up. I trust you will not be wanting in that consideration which is so ordinarily extended. Please let me know whether the different shares belonging to my brother, which you hold, have now all been sold up and credited to the account."

I think that correspondence, the Bank, on the one hand, showing by their letters and by the copies of the accounts which they sent that they were charging interest upon the account and the defendant taking no objection to it, amounted, in my opinion, to an agreement to pay what was then owing in consideration of time being given by the Bank.

On the 15th of April, there was a further letter sent by the Bank which is significant, because at the bottom of that letter they set out the amount of the debit—it is at page 37 of the Paper-book—as Rs. 24,948-9-9 and interest up to the 20th of April making the total of Rs. 25,561-1-9. That, to my mind clearly set out that interest was being claimed by the Bank, and there was no objection raised by the defendant in any shape or form.

Then on the 7th of June the defendant writes again a letter in which he points out that it will be much better for the Bank to allow his brother further time. He says, "In the first place the recovery of your balance by means of a suit will take four times more time than is actually necessary to recover it in a friendly way by showing some little further consideration. In the second place my brother tells me that after receiving my letter he has begun making some payments to you and has promised to make weekly payments. The whole thing really depends on his being able to proceed with his business which he hopes to do by the 15th of July as arrangements are almost complete, and he will be able to make you substantial payments. At any rate you could wait till August to see whether his expectations turn out to be correct, if in the meantime he goes on making you some payments. I would, therefore, again ask you to be so kind as to wait till then and also to instruct your solicitors accordingly."

The defendant in my judgment must have known that the interest on the overdraft was running on, even if it had not been expressly drawn to his attention as it was in the letters, *e. g.* 23rd March 1914 and 15th April 1914, and when he asked for forbearance and time and gave his undertaking to see the Bank paid, in my opinion, he must be taken to have agreed to pay the usual interest charged by the Bank until the balance was paid.

On the 16th July 1914, the Bank wrote a letter which is at page 40 of the paper book, and after claiming payment of the amount due, demanded interest at the rate of 2 per cent. over the Bank rate, and after that date there appears to have been no further correspondence. I do not think that interest can be charged at any but the rate which was usual on the account, *viz.*, 1 per cent. over Bengal Bank rate, and if it has been charged at 2 per cent. over the Bank rate, the account must be adjusted.

As regards the last point that the whole account should be reopened, I think that no sufficient ground has been shown by the defendant for reopening the accounts, and I agree with the judgment of the learned Judge on this part of the case.

In my judgment the appeal should be dismissed with costs. The learned counsel for the Bank having stated that he was prepared to take judgment of the amount due on the 16th July 1914, *viz.*, Rs. 25,178-2-9, the decree will be varied by substituting the abovementioned sum for the amount of Rs. 25,454-12-9 mentioned in the decree.

**Woodroffe, J.**—The agreement of guarantee of 10th June, 1913 on which the plaintiff Bank sues is admitted, but the defendant's liability thereunder is said to have been discharged by dealings prejudicial to him between the creditor and debtor. The defendant secondly denies his liability to pay interest after date of the agreement; and lastly in the event of these two issues being decided against him, then he asks that an account be taken of what is due by him. The guarantee was given by the defendant for his brother's debts to the plaintiff Bank which at its date amounted to over 5 lakhs of rupees because it was discovered that documents given by A. H. Ghuznavi his brother to the Bank were forged with the result that A. H. Ghuznavi's overdraft was largely unsecured. The defendant appellant in consideration of favourable treatment by the Bank towards his brother agreed to pay the Bank on the 30th September, 1913 to the extent of 3 lakhs all money then due by his brother on current account including all interest, charge and other expenses. The manager Mr. Stewart says that

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the appellant asked him not to press his brother and not to foreclose but to allow him to continue doing business. There is no question that the amount then due was Rs. 86,343-5 including interest. A demand for payment of this sum elicited no response from the appellant. He was repeatedly written to, given information of the state of account and asked for payment, but sent no reply until several months had passed, when he at length asked for further time, assuring the Bank that they need not have any anxiety, for that he would see that the amount due by his brother was fully paid up. During this time, owing to several credits, the amount of the debt of A. H. Ghuznavi was reduced to Rs. 25,454-12-9, the amount claimed in the plaint. During this period also there took place the act which is the chief subject matter of this appeal. The appellant did not pay up the sum due, and his brother on 16th October, 1913 asked the Bank to open a separate account called account No. 2, to enable him to continue his business. He had then 20,000 which he wished to deposit provided only the Bank would allow him to withdraw it by cheques, that is to say, it was not to be taken in payment of the amount due on the former account called account No. 1. The Bank agreed to open No. 2 account to be kept separate from No. 1 account, the original overdraft account. The bank, however, took the money with the stipulation on its part that any profits made on account No. 2 should go to the credit of account No. 1. This was done and the debit balance reduced. It is admitted that the Bank did not advise the appellant of this arrangement which the latter claims discharged him of all liability under the agreement.

It is to be noted on these facts that no complaint is made against the Bank in respect of any matter prior to the 30th September, 1913. The Bank did nothing which increased or affected the liability of the surety to pay the sum mentioned on the date stated. This is, therefore, not a case where during the pendency of the agreement, and before it had matured, the creditor does something which increases the surety's liability or impairs his rights. Had the Bank sued the surety on the 1st October for recovery of the sum agreed to be paid on the preceding day, no question as to the latter's liability could have arisen. But the surety did not pay though repeatedly pressed to do so. The rights of the Bank having thus fully matured to the payment of both principal and interest, what, if any, were their duties to the guarantor? They were entitled to close the account against him and claim what was due on it. They were on the other hand bound to credit any

subsequent payments made by the debtor for the purpose of clearing his debt. It is not denied that they did this, that is, the Bank credited the payments made to it for that purpose. It is not and could not be argued that if the debtor had money and refused to pay it to the Bank in discharge of his debt, that this would make the Bank liable. What is said is that the debtor had Rs. 20,000 which he might have paid towards his debt, but did not, refusing to make it over to the Bank except upon the express condition that the sum so received by them was not to be employed in reduction of the debt on account No. 1, but only the profits arising from account No. 2 opened with the sum mentioned. It is said that the Bank injured the guarantor's rights by acceding to this request and opening a second account. It is obvious that the first account was not thereby directly affected, for the second was a separate account. What is said is that if the debtor had paid the Rs. 20,000 to credit of the first account instead of opening a second account, the first account would have been reduced by the difference between that sum and the profits earned in the second account, *viz.*, some Rs. 18,000. But the debtor was not desirous of paying this sum of Rs. 20,000 in discharge of his debt, nor could the Bank compel him to do so. They might have refused to open this second account and the debtor might have taken his money elsewhere. This would not have benefited the guarantor in any way. On the contrary what they did do was, so far as it went, for his benefit. For they stipulated that the sum earned in the second account should be credited to the discharge of the first account, and in this way the debt, and therefore the appellant's guarantor's liability, was actually reduced. To the extent of such reduction he has been benefited by what has been done. A suggestion is, however, made that if the Bank had communicated its transaction to the guarantor who went to Arabia, the latter would have done better for himself than merely getting the profits on account No. 2, for he might have insisted that his brother should not continue his business in this way but should pay the Rs. 20,000 towards payment of his debt under account No. 1, and that if he refused he could have enforced his wishes by legal means taken against his brother. This suggestion is I think without any reality. I do not believe that the appellant would have done anything of the kind, and think that the contention is an afterthought with a view to defeat a claim which has already been delayed. The defendant has not given his evidence to say what he would have done, or in what way he

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has been damnified, nor was any suggestion made on this head to Mr. Stewart in cross examination. On the contrary the unrebutted evidence is that the appellant wished that his brother should continue his business which he could not have done if all the available sum were appropriated by the Bank towards the discharge of the debt due on account No. 1. Apart from this the objection when examined is that the Bank did not refuse to open account No. 2 and did not do what they could not have compelled the debtor to do *viz.*, insist upon his paying the Rs. 20,000 to credit of account No. 1 and so further reduce the amount payable by the appellant. In opening the new account the Bank in fact stipulated that the profits arising therefrom should go to the credit of the first account which was in fact reduced in this way. The objection now taken is put forward here in Court for the first time. On the 4th March, 1914 the appellant wrote to the Bank "I shall assure you that I will see that what is now owing to you from my brother is fully paid up."

It is suggested that this meant that he would see that his brother paid and not that he would pay. This is not the way in which it was understood by the Bank who were thus asked for time and who on the 15th April, 1914 wrote "We note your assurance that you will see that the amount due to us by your brother is fully paid. We wish, however, the matter settled now, etc." In my opinion upon the facts the surety is not discharged.

As regards interest the appellant's contention in substance is that though if he had done what he agreed to do, *viz.*, pay what was due for principal and interest on the 30th September, he would have had to pay interest, yet because he did not, but was given time by the Bank, he is not to pay interest at all as the sum due on the 30th September has been wiped out by appropriation of the Bank, and the agreement does not provide for interest subsequent thereto. In effect the appellant asks us to penalise the Bank for its indulgence towards him. It would have been better if the Bank had expressly provided against this contingency-not impossibly it did not occur to them that the appellant would take the kind of objections which have been argued before us. However this may be that contention fails. The Bank was entitled to interest on the 30th September, and if necessary I would declare that the appellant do pay such interest crediting subsequent payments to principal only. But this is not necessary as I agree with Chaudhuri J. that the appellant is liable for interest, and if not he would be liable for the same amount as and by way of damages. The Bank cannot

be reasonably made to suffer for the appellant's default. The sixth and only ground of appeal touching interest does not raise the point argued. As regards the rate of interest I agree with the Chief Justice.

The appellant further says that he would like to have particulars of the claim, and that therefore an account should be taken.

The Bank has put forward their claim as a correct statement of account and the defendant has not impugned it. He was informed from time to time of the state of the account and never at any time disputed its correctness. The present request for information appears to be dictated more by a desire to gain time than to know how the account is made up.

On June 7th, 1914 the appellant wrote to the Bank's manager when asking for further time. "The recovery of your balance by means of a suit will take four times more time than is actually necessary to recover it in a friendly way." There is no reason why this should be so if the matter is not purposely delayed. In my opinion the appellant has failed to establish that the judgment of Chaudhuri J. is wrong and I would dismiss the appeal with costs.

**Mookerjee, J.**—This is an appeal by A. K. Ghuznavi, the defendant, in an action for recovery of money due on a contract of guarantee. The brother of the appellant, A. H. Ghuznavi, who carried on business in Calcutta as a jute bailer and shipper under the name of A. H. Ghuznavi & Co. had a current account with the plaintiff respondent, the National Bank of India. In 1913 the Bank discovered that securities which had been put in by A. H. Ghuznavi to cover advances made by them were spurious and that large overdraft was consequently unsecured. The Bank thereupon required him to supplement the securities he had already pledged. The defendant, who wanted that his brother should continue the business, interviewed the manager of the Bank, requested him not to foreclose and offered to hold himself responsible, should the Bank allow his brother to continue. The Bank accepted the offer and the terms of the agreement were set out in a document as follows :

"In consideration of your having agreed, at my request, to extend the time for payment of the moneys overdrawn by Messrs. A. H. Ghuznavi & Co. upon their current account with you, I, the undersigned Abdul Karim Abu Ahamed Khan Ghuznavi hereby agree with you as follows :

"I will pay to you on the 30th September 1913, to the extent of Rs. 3,00,000, all money then due to you from Messrs. A. H. Ghuznavi & Co. on current account or otherwise howsoever,

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including all interest, charges and other expenses which you may charge against Messers A. H. Ghuznavi & Co.

"No possession of any guarantee from any other person or of any other security shall determine, prejudice or lessen my liability hereunder."

On the 10th June, 1913, when this guarantee was given by the defendant for the benefit of his brother, the overdraft by the latter on the Bank stood at Rs. 5,41,653-2as. Thereafter, various payments were made by A. H. Ghuznavi from time to time, and sums were also realised by the Bank by the sale of securities held by them. There was practically no fresh overdraft, and on the 30th September 1913 the sum due, inclusive of interest, had been reduced to Rs. 86,343-5as. It is plain that, under the agreement of guarantee, the defendant did, on that date, become liable to the Bank to the extent of the sum just mentioned. Notwithstanding protracted negotiations, the Bank failed to recover anything from the defendant, and on the 12th November, 1914, they instituted this suit for recovery of Rs. 25,454-12-9p. In claiming this sum the Bank have allowed credit for various payments made by A. H. Ghuznavi & Co. since the 30th September, 1913 in reduction of the overdraft, but they have also charged interest on the sum overdue. The defendant resisted the claim substantially on the ground that the guarantee was discharged, *first*, because the Bank, without his consent, on the 16th October, 1913, opened another account with his brother, who then deposited in cash a sum of Rs. 20,000, and *secondly*, because the Bank failed in their duty towards him as surety, as they did not intimate to him the transactions with his brother which commenced on the 16th October, 1913, and went on apparently to the 3rd March, 1914. These contentions have, in my opinion, been rightly overruled by Mr. Justice Chaudhuri.

In support of the first branch of the argument, reference has been made on behalf of the appellant to the decision in *Re Sherry*(1); but that case, when carefully analysed, does not assist his contention. It is well settled that, in the absence of special agreement, a guarantor has no right to control the appropriation, by customer or banker of moneys paid in, subject to the qualification that the banker is bound to deal with the accounts in the ordinary way of business: *Kirby v. Marlborough* (2); *Lysaght v. Walker* (3). Thus, payments in may be appropriated to a pre-existing debt which is not covered by the security and of which the surety had no

(1) (1884) 25 Ch. D. 692.

(2) (1813) 2 M. and S. 18.

(3) (1831) 5 Bligh N. S. 1.

knowledge : *Williams v. Rawlinson* (1). On the termination of the guarantee, the account may be closed and a new one opened to which all payments in may be carried ; though the banker is not entitled, where an account is guaranteed to a limited extent, to split that account during the continuance of that guarantee and attribute all payments in to the unsecured balance : *Bechervaise v. Lewis* (2) ; *Exp. Hanson* (3). It is perfectly intelligible that so long as an account is unbroken, a surety should not be prejudiced by any departure from the rule of appropriation of items in order of date, as enunciated in *Clayton's case* (4) unless his consent to such departure is expressed or can be implied from the character of his engagement : *Cory Brothers v. Mecca* (5). But I cannot appreciate how, after the liability of the defendant under the contract of guarantee had become fixed on the 30th September, 1913, he can maintain that the guarantee was discharged merely because a new account was opened by the Bank with the principal debtor on the 16th October, 1913 ; there is clearly no room for the application of the doctrine that it is contrary to ordinary business and good faith to open a new account during the currency of the guaranteed one and carry all payments in to the new account :—a principle based on the self-evident position that the real rights of the surety cannot be prejudiced by the method of book-keeping, for as Lindley M. R. said in *Mutton v. Peat* (6) it is immaterial “how the bankers may have manipulated their books or how many accounts they may have kept.” If this is borne in mind, the observation of Cotton, L. J. in *Re Sherry* (7) as to the effect of an attempt by a Bank to make a new account before the guarantee terminates, whereon Mr. Langford James strongly relied, proves valueless for the purposes of his argument : See also *City Discount Co. v. McLean* (8) ; *York Banking Co. v. Bainbridge* (9) ; *Browning v. Baldwins* (10). We must further bear in mind the fundamental fact that A. H. Ghuznavi offered to open the second account with the Bank, only on condition that he would be permitted, to draw upon it for the purposes of his business, in other words, that his deposit would not be applied in reduction of the overdraft on the first account. The position then was that if the Bank accepted the condition, they could not apply the deposit contrary to their engagement ; if they refused to accept the deposit

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(1) (1825) 3 Bing. 71.

(3) (1811) 18 Ves. 232.

(5) (1897) A. C. 286 (295).

(7) (1884) 25 Ch. D. 692 (705).

(9) (1880) 43 L. T. 732.

(2) (1872) L. R. 7 C. P. 372.

(4) (1816) 1 Mer. 572.

(6) (1900) 2 Ch. 79 (85).

(8) (1874) L. R. 9 C. P. 692.

(10) (1879) 40 L. T. 248.



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subject to the condition imposed, A. H. Ghuznavi would not have opened a second account. In either event, the surety could not by any possibility be prejudiced. It is an elementary rule that any specific direction regarding the appropriation of a deposit must be observed by the Bank. In the case before us, the agreement between the Bank and the depositor made it impossible for the Bank to apply the deposit in reduction of the overdraft on the first account; consequently, the fact that the deposit was not so applied, does not justify the contention that the Bank were at fault and the surety must be deemed discharged; there was thus no room for the application of the rule in *Clayton's case* (1). As an illustration, reference may be made to *Wilson v. Dawson* (2); there a buyer of cattle, who was indebted to a Bank as principal upon a note that had matured, deposited an amount greater than the note, under special agreement that the deposit would be applied only in payment of cheques drawn by him in favour of sellers of cattle. This arrangement was made without the assent of the surety who had guaranteed the promissory note; yet it was ruled that the surety was not released by the failure of the Bank, to apply the deposit in discharge of the note.

In support of the second branch of the argument of the appellant, reliance has been placed upon *Rees v. Berrington* (3); *Polak v. Everett* (4) and *Holme v. Brunskill* (5); and particular stress has been laid upon a passage in the judgment of Loughborough, L. C. in the case first mentioned: "it is the clearest and most evident equity not to carry on any transaction without the privity of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." On this, the argument is sought to be founded that the Bank failed in their duty to the appellant when they carried on transactions with his brother under the second account without any intimation to him. This contention is, I think, wholly unsubstantial. In the first place, the statement of the rule in *Rees v. Berrington* (3) must be taken subject to the qualification formulated by Brett, L. J. in *Holme v. Brunskill* (5). The true rule is as Chitty, J. observes in *Bolton v. Sammon* (6), that if there is

(1) (1816) 1 Mer. 572.

(3) (1795) 2 Ves. Jun. 540; 3 R. R. 3.

(5) (1878) 3 Q. B. D. 495 (508),

(2) (1876) 52 Ind. 513.

(4) (1876) 1 Q. B. D. 669.

(6) (1891) 2 Ch. 48 (54).

any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if there is any alteration, which is not obviously either unsubstantial or for the benefit of the surety, he is to be the sole judge whether he will remain liable. This is substantially in accord with section 139 of the Indian Contract Act, which provides that if the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged. The rule thus enunciated fits in with the statement of Story (Equity Jurisprudence section 325) adopted by the Court of Exchequer in *Watts v. Shuttleworth* (1). Reference may also be made to the rule enunciated in section 133 of the Indian Contract Act which embodies a familiar principle relating to the discharge of a surety by variance in terms of the contract, recognised in a long line of decisions, amongst others, in *Bonar v. Macdonald* (2); *Ward v. National Bank* (3); and *Taylor v. Bank of New South Wales* (4). The judgment of the Judicial Committee delivered by Sir Robert Collier in *Ward v. National Bank* (3) is specially instructive and approves of the decisions in *Polak v. Everett* (5) and *Holme v. Brunskill* (6). In the second place, it is clear to my mind that what the Bank did when they opened the second account with A. H. Ghuznavi was exactly in conformity with what had been the intention of the appellant; his desire throughout was that the Bank should not foreclose, that his brother should carry on the business, and should have facilities for that purpose. This has been precisely the result of the opening of the second account, and the appellant himself has been to some extent benefited thereby, as monies taken from the second account have, from time to time, been placed to the credit of the first account for the reduction of the overdraft therein. There is no reality in the contention that if the appellant had been apprised in time of the transactions in the second account, he might have taken effective measures to protect himself against his brother. I feel no doubt that the defendant would never have taken any action of the kind now suggested; this is plainly shown by his conduct after he had become aware of the transactions in the second account. He not only never protested but he actually took time repeatedly to satisfy

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(1) (1860) 5 H & N. 235; (1861) 7 H. & N. 353; 120 R. R. 559; 126 R. R. 471.

(2) (1850) 3 H. L. C. 226 (238).

(3) (1883) 8 App. Cas. 755 (763).

(4) (1866) 11 App. Cas. 596 (603).

(5) (1876) 1 Q. B. D. 669.

(6) (1878) 3 Q. B. D. 495.

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the dues of the Bank. Assume that this does not affect his legal rights, but his conduct affords valuable evidence of his true intention. In my opinion, the argument of the appellant fails in both its branches; this is clearly not a case where we can say that the Bank had the means of satisfying the overdraft, either actually or potentially in their control or within their possession, and yet, to the prejudice of the surety, did not choose to avail themselves thereof; nor can we say that the Bank entered into fresh transactions with the debtor which constituted a variation of the original contract or in any way impaired the eventual remedy of the surety against the principal debtor. The claim of the Bank must consequently be sustained.

There remain two subordinate questions which require a brief examination: *first*, is the appellant entitled to have the accounts opened; *secondly*, is he liable for interest after the 30th September, 1913, and if so, at what rate. I think the contention that the appellant is entitled to an account, is, in the circumstances of this case, illusory. The appellant was informed from time to time as to how the accounts stood as between the Bank and his brother; he never disputed the correctness of the accounts; in fact, he never even expressed a desire to test them. The suggestion of the respondent that this question has now been raised with a view to gain time, is, I think, not quite groundless, and receives support from the fact that no serious attempt has been made to challenge any specific items in the account before us or even to indicate that there are any entries which required explanation or investigation. No ground, in my opinion, has been made out to justify an order for enquiry into the accounts. As regards the claim for interest, it is contended that there was no agreement to pay interest after the 30th September, 1913, and that the elements necessary to support a claim under the Interest Act of 1839 have not been established. This may be conceded; but it is plain that the Bank can rightly claim interest by way of damages for the detention of the money due to them. Authority for this position may be found in the decision of the Judicial Committee in *Lala Chhajmal v. Brij Bhukhan* (1) and in a long line of cases reviewed in *Mohamaya v. Ram Khelawan* (2) and *Ramjiban v. Dhikhu* (3) which show that the strict rule of the English Common Law, as enunciated in *London C. & D. Ry. Co. v. South Eastern Ry. Co.* (4), has not been followed in this country. I think also that this

(1) (1895) L. R. 22 I. A. 199; I. L. R. 17 All. 511.

(2) (1911) 15 C. L. J. 684.

(3) (1912) 16 C. L. J. 264 (270).

(4) (1893) App. Cas. 429.

is pre-eminently a case where interest should be allowed ; the defendant repeatedly obtained time from the Bank ; his conduct may well be deemed to imply an undertaking to pay interest, for no commercial man would agree to an extension of time, unless he understood that the sum overdue would carry interest during the extended time. As regards the rate, I think, the Bank can reasonably claim only what was originally agreed upon between them and the debtor, and not the higher rate demanded from the appellant in their letter of the 16th July, 1914. No contract was made for payment of interest at the higher rate and none can be implied from the conduct of the parties. The decree, consequently, requires to be varied in this respect.

Subject to the variation indicated, the decree must be affirmed, and with costs, as the appeal has substantially failed.

*Mr. H. C. Bannerjee* :—Attorney for the Appellant.

*Messrs. Sanderson & Co.* :—Attorney for the Respondents.

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*Appeal dismissed ; Decree modified.*

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## FULL BENCH.

*Before Sir Lancelot Sanderson, Knight, K. C., Chief Justice, Sir John Woodroffe, Knight, Judge, Sir Asutosh Mookerjee, Knight, Judge, Sir Herbert Holmwood, Knight, Judge, and Mr. Justice D. Chatterjee.*

JNANADA SUNDARI CHOWDHURANI

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AMUDI SARKAR AND OTHERS.\*

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*February, 7.*

*Second Appeal—Bengal Tenancy Act (VIII of 1885), Sec. 109A, Sub-sec. (3) and Proviso—Decision settling rent—Settlement of fair and equitable rent—Increase of area—Erroneous view of legal rights of parties—Civil Procedure Code (Act V of 1908), Sec. 100.*

When, in a proceeding under section 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-section (4) in accord-

\*Full Bench Reference in Appeal from Appellate Decree No. 577 of 1909, against the decision of H. Walmsley, Esq., Special Judge of Mymensingh, dated the 14th July, 1908, modifying that of Babu Beni Madhub Chatterji, Settlement Officer of Mymensingh, dated the 14th February, 1906.

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ance with the rules laid down in section 52, and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, a second appeal is not barred by section 109A of the Act.

The High Court can interfere in an appeal under section 109A of the Bengal Tenancy Act, only if the decision of the lower appellate Court involves an error of law. An erroneous view of the legal rights of the parties as determined by the contract entered into by the parties is liable to examination in second appeal.

Appeal by the Plaintiff.

Application for settlement of fair and equitable rent.

*Kabuliats* were executed by tenants for holdings before the passing of the Bengal Tenancy Act. One *kabuliat* executed by a tenant in respect of 6 arras odd "described in the schedule", and the tenant promised to pay Rs. 29 odd as rent for the said lands "according to the description and rates given below." The schedule gave the area, boundaries and classification of each plot. It was stipulated in the *kabuliat* that the landlord could have the land measured within the term, and if the area or the classification was found to be wrong, the tenant would be bound to pay additional rent or be entitled to a reduction of rent, as the case might be.

The question in controversy between the parties was whether the landlord was entitled to rent for the whole area ascertained by measurement to be within the tenants' holdings at the rates mentioned in the *kabuliats*. The Settlement Officer decided that the tenants were in possession of land which was in excess of the area mentioned in the tenancy agreement and that it was open to the landlord to have the matter of the area enquired into. The tenants thereupon appealed to the Special Judge, who reversed the decision of the Settlement Officer upon the question as to whether the tenants were in possession of excess land. He then proceeded to deal with the rates of rent with regard to the lands which were specified in the tenancy agreement. The landlord thereupon filed appeals, twelve in number, out of which the present appeal was referred to the Full Bench by Woodroffe and Coxe JJ. But as no one appeared for the respondents in this appeal, Babu Upendra Lal Roy and Moulvi Nuruddin Ahmed, who appeared in some of the other appeals were allowed to appear for them as *amicus curiae*.

### Order of Reference.

These appeals arise out of proceedings for the settlement of a fair and equitable rent, and the substantial question in controversy between the parties is whether the landlord is entitled to rent for the whole area ascertained by measurement to be within

the tenants' holdings at the rates mentioned in the *kabuliats* which were executed by the tenants for these holdings before the passing of the Tenancy Act. One *kabuliat* has been translated and laid before us as a sample of their terms. This was executed by the tenant in respect of 6 arras odd "described in the schedule" and the tenant promised to pay Rs. 29 odd as rent for the said lands "according to the description and rates given below." The schedule gave the area, boundaries and classification of each plot, and ended in an abstract showing (i) the total area of each class of land, (ii) the rate of rent per area of that class, and (iii) the total rent payable for the area in each class. It was stipulated in the *kabuliat* that the landlord could have the land measured within the term, and if the area or the classification was found to be wrong, the tenant would be bound to pay additional rent or be entitled to a reduction of rent, as the case might be.

The Settlement Officer held that these stipulations in the *kabuliats* regarding the payment of rent according to the result of a further measurement were valid and decided the point in controversy in favour of the plaintiff. The learned District Judge has reversed the Settlement Officer's decision on that point and the plaintiff appeals.

It appears to us that the Settlement Officer's decision is in accordance with the principles laid down in *Rajkumar Pratap Sahay v. Ram Lal Singh* (1), and *Akbar Ali Mian v. Mussamat Hira Bibi* (2), with which, on this point, we are in agreement. On the merits, therefore, we think that the appeal should succeed.

A preliminary objection, however, has been taken that no appeal lies on the ground that the decision of the District Judge is a decision settling a rent within the meaning of section 109A of the Tenancy Act. It was held in *Akbar Ali Mian v. Mussamat Hira Bibi* (2), cited above, that in cases of this nature an appeal lay. The question, however, was not discussed and the decision proceeded on the principle of *stare decisis*, the rulings followed being *Mathura Mohun Lahiri v. Uma Sundari Debi* (3), and *Rajkumar Pratap Sahay v. Ram Lal Singh* (1), quoted above. The latter ruling is clearly in point. The facts were almost exactly the same as those of the case now before us. The decision of *Mathura Mohun Lahiri v. Uma Sundari Debi* (3), was under the unamended Act, but the principle on which it proceeded seems

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(1) (1907) 5 C. L. J. 538.

(2) (1912) 16 C. L. J. 182.

(3) (1897) I. L. R. 25 Calc. 34.

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to us to be the same. Under the Act as it then stood an appeal lay to this Court from the decision of a Special Judge 'in any case under section 106.' Section 106 dealt with disputes over the correctness of an entry in the record-of-rights (not being an entry of a rent settled). Consequently disputes over an entry of a rent settled did not come within section 106, and so could not be the subject of an appeal to this Court. It was held, however, in the case cited that when, in proceedings taken on the application of a landlord for the settlement of rent, the liability of the tenants to pay rent on account of any alleged excess area was decided, an appeal lay to this Court.

On the other hand the opposite view was taken in *Rameswar Singh v. Bhooneswar Jha* (1), and *Grant v. Ram Rebha Bhagat* (2), that in cases of this nature no second appeal lay. A reference to the papers of the last-mentioned case shows that in it increased rent was claimed on the ground of an increase of area. In our opinion these two cases cannot be reconciled with the other cases mentioned above, and the point can only be settled by a Full Bench.

We would formulate the point as follows: "When in a proceeding under section 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-section (4) in accordance with the rules laid down in section 52, and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, is a second appeal barred by section 109A of the Act."

We make this reference in Appeal No. 577. The other analogous appeals will remain pending till this is disposed of. The rules granted in these cases are discharged as no possible question of jurisdiction arises.

*Babu Dwarka Nath Chuckerbutty* (with him *Babus Chandra Kant Ghose, Girija Prosonno Roy Chowdhury* and *Nilkantha Ghose*) for the Appellant: If in settling rent under section 105, any of the matters under section 105A or section 106 (as it originally stood) has to be decided, then the decision with regard to the matter is open to second appeal, though the decision settling the rent after these preliminaries is final. The proviso to section 109A shows that although the appeal is against the final decree settling the rent, the High Court can alter the judgment of the Special

Judge regarding the particulars on which the rent is settled, though it cannot interfere with the decision settling the rent.

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In the present case, the landlord says "you are in possession of more lands than you are paying for. The tenant says 'no'. Then an issue arises as to area and as to whether there was any special condition in the contract. That is a point which may be decided under section 105A or 106.

[Mookerjee, J. The tenant's case is that he is liable to pay rent for a certain area and that even if he is in occupation of more area, he is not liable to pay additional rent for it. The landlord controverts this claim. So the question reduces to this—Is the tenant in occupation of any land for which he is not liable to pay rent, as he alleges? After that question is decided, the Settlement Officer will proceed to settle fair and equitable rent].

Yes, that is the question.

Reads headnotes at p. 539 of the case of *Rajkumar Pratap Sahay v. Ram Lal Singh* (1) and *Akbar Ali Mian v. Mussamat Hira Bibi* (2). The case of *Rajkumar* (1) was referred to in the Reference to the Full Bench in *Pirthichand v. Basarat* (3). The point was practically settled by the Full Bench decision.

[He was then stopped].

*Babu Upendra Lal Roy* (*amicus curiæ*) for the Respondents. The question depends solely on the construction of section 109A of the Bengal Tenancy Act. 'This section clearly limits the right of appeal in a case under section 105 to a decision settling a rent and it further limits a right of appeal by making it subject to sections 100 to 103 of the Code of Civil Procedure. The appeal would lie only on one of the grounds stated in section 100 of the Code of Civil Procedure. The present case does not come under cl. (a) or (b) of section 100.

[Mookerjee, J. Is not the legal effect of the contract between landlord and tenant a question under section 100 (a)? Section 100 does not shut out an appeal.]

The decision on the contract is a decision on a question of fact.

[Mookerjee, J. You contend, there is no point of law in the case. But that cannot be taken as a preliminary objection.]

[Woodroffe, J. As *Amicus Curiae*, what have you got to do with the point—whether there is a question of law or not?].

[Mookerjee, J. That has been decided against you by the Division Bench. "On the merits the appeal should succeed."]

(1) (1907) 5 C. L. J. 538.

(2) (1912) 16 C. L. J. 182 (183).

(3) (1909) I. L. R. 37 Calc. 30; 10 C. L. J. 343.



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The appeal is barred under section 109A of the Bengal Tenancy Act. Refers to *Rameswar Singh v. Bhooneswar Jha* (1) and *Grant v. Ram Rekha* (2).

The appellant contends that so far as the excess lands are concerned, the decision is not a decision settling rent.

[Sanderson, C. J. He says, the decision is not merely a decision settling a rent, but a decision settling something else besides. It is against that something else besides, that he is appealing].

I submit that the present case does not come under any of the clauses of section 105A.

*Moulvi Nuruddin Ahmed* on the same side : The question is whether the Settlement Officer had jurisdiction to decide a question of excess area under section 52, in a proceeding under section 105. If he had, then the decision is a decision settling a rent.

The words "in respect of the land held by the tenant" have been interpreted to mean also excess lands held by the tenant. This is a question essentially under section 105 and hence there is no second appeal. This is the view taken in the case of *Rameswar Singh* (1).

The cases referred to in the Referring order as against me are not really against me. The case of *Rajkumar Pratap v. Ram Lal* (3) proceeded on the ground that there was no excess area and no rent to be settled.

The case of *Mathura Mohun v. Uma Sundari* (4), on which *Akbar Ali v. Hira Bibi* (5) is based, does not consider the earlier rulings on the point which favour my contention. It does not appear there was any discussion about settling a rent. The earlier cases are *Shewbarat v. Nirpat* (6), *Lala Kirut Narain v. Palukdhari* (7) and *Achha Mian v. Durga Churn* (8). The principle is whenever there is a question of rent and the rent has been settled, there is no second appeal.

The case of *Rameswar* (1) was cited with approval in *Rajkumar Pratap* (3).

[Sanderson, C. J. Is not that case just the same as in *Rameswar* (1) ].

In that case there was no question of settling fair and equitable rent.

(1) (1906) 4 C. L. J. 138 ; I. L. R. 33 Calc. 839.

(2) (1910) 14 C. L. J. 110.

(3) (1907) 5 C. L. J. 538.

(4) (1897) I. L. R. 25 Calc. 34.

(5) (1912) 16 C. L. J. 182.

(6) (1889) I. L. R. 16 Calc. 596.

(7) (1889) I. L. R. 17 Calc. 326.

(8) (1897) I. L. R. 25 Calc. 146.

[Sanderson, C. J. That part of the judgment which settles fair rent is in respect of lands other than the excess lands].

The application here was expressly made under section 105 for settlement of fair and equitable rent.

The judgments of the Court were as follows :

**Sanderson, C. J. :—**The question which was referred to this Court relates to a preliminary point as to whether there was a second appeal, under the circumstances of this case, and it is stated at page 2 of the paper book before me as follows, "when in a proceeding under section 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-section (4) in accordance with the rules laid down in section 52, and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, is a second appeal barred by section 109A of the Act."

The Settlement Officer had decided that the tenants were in possession of land which was in excess of the area mentioned in the tenancy agreement. The tenancy agreement provided that the landlord could have the land measured within the term, and if the area or the classification was found to be wrong, the tenant would be bound to pay additional rent or be entitled to a reduction of rent, as the case might be. The Settlement Officer held that by reason of that provision it was open to the landlord to have the matter of the area enquired into. He, therefore, proceeded to enquire into it, and held, as I have already said, that the tenants were in fact in possession of excess land.

The tenants thereupon appealed to the Special Judge, who reversed the decision of the Settlement Officer upon the question as to whether the tenants were in possession of excess land. He then proceeded to deal with the rates of rent with regard to the lands which were specified in the tenancy agreement. His judgment is to be found at pages 26 and 27 of the paper-book of appeal No. 2915 of 1908. I need not read it. He begins his judgment, with regard to the first finding in this way. "Next comes the question of whether the tenants have been found to be in possession of any excess land ;" and, his conclusion is that "for these reasons I hold that the Settlement Officer was wrong in finding that the tenants or many of them, are in possession of excess land." Then at page 27 he proceeds to deal with the question of rent. Now, the decision of this question depends upon a few sections of the Bengal Tenancy Act which I propose to read. The first section to which

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I need draw attention is section 52. I do not intend to read but merely mention it, for the purpose of showing that I have not forgotten it. Section 105, sub-section (1) provides that "when, in any case in which a settlement of land-revenue is not being made or is not about to be made, either the landlord or the tenant applies, within two months from the date of the certificate of the final publication of the record-of-rights under section 103A, sub-section (2), for a settlement of rent, the Revenue Officer shall settle a fair and equitable rent in respect of the land held by the tenant." Then section 105A provides, "where in any proceedings for the settlement of rents under this part, any of the following issues arise :—(a) whether the land, is, or is not, liable to the payment of rent ... .. the Revenue Officer shall try and decide such issue and settle the rent under section 105 accordingly." Then section 109A, sub-section (3) provides, "Subject to the provisions of Chapter XLII of the Code of Civil Procedure, an appeal shall lie to the High Court from the decision of a Special Judge in any case under this section (not being a decision settling a rent) as if he were a Court subordinate to the High Court within the meaning of the first section of that Chapter : Provided that, if in a second appeal the High Court alters the decision of the Special Judge in respect of any of the particulars with reference to which the rent of any tenure or holding has been settled, the Court may settle a new rent for the tenure or holding " and so on.

Now, in my judgment, section 109A clearly contemplates an appeal from the Special Judge of the High Court, *with reference to the particulars* in respect of which the decision which settles the rent is given. It was argued by the learned vakil who appeared for the appellant that the matter upon which the judgment was given in this case was a particular 'with reference to which the rent of any tenure or holding has been settled,' or to put in the negative way, it was, not merely a decision settling a rent. I agree with his contention. I can quite see that a matter such as this between the landlord and tenant may be a matter of great importance which may involve not only a question of fact but a question of law, as it seemed to me the question in this case did involve a question of fact as well as of law : First of all, it was alleged that under the terms of the agreement the landlord was entitled to go beyond the area which was specified in the agreement, and was entitled to have the area of the land remeasured and settled which was clearly a question of law ; and, it also involved the question of fact whether

the area contended for by the landlord was the right one or that contended for by the tenant was the right one.

For these reasons I come to the conclusion that that part of the judgment of the Special Judge in which he overruled the judgment of the Settlement officer was 'not merely a decision which settled the rent.' Therefore, there was an appeal from the decision of the Special Judge to the High Court. The conclusion at which I have arrived upon a consideration of these sections is supported by the decisions which were cited on behalf of the appellant. It was only necessary for me to say, therefore, that the answer which, in my opinion, ought to be given to the question that has been referred is that the appeal in this case is not barred by section 109A of the Act.

I, therefore, think that the appeal ought to be entertained, and having been entertained it ought to be allowed, and the decision of the Settlement Officer restored, with costs both of this Reference and in the Division Bench—hearing fee, one gold mohur for each hearing.

**Woodroffe, J.**—I agree that the question referred to us should be answered in the negative and therefore an appeal lies. On the merits also, as is stated in the referring order, I think the appeal should succeed.

**Mookerjee, J.**—The question referred for decision by this Full Bench has been framed in the following terms: "When, in a proceeding under section 105 of the Bengal Tenancy Act, the Settlement officer is asked to increase the rent under sub-section (4) in accordance with the rules laid down in section 52, and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, is a second appeal barred by section 109A of the Act." In my opinion, this question should be answered in the negative, on a true interpretation of sub-section 3 of section 109A of the Bengal Tenancy Act. That sub-section provides that "subject to the provisions of Chapter XLII of the Code of Civil Procedure of 1882, an appeal shall lie to the High Court from the decision of a Special Judge in any case under this section (*not being a decision settling a rent*), as if he were a Court subordinate to the High Court within the meaning of the first section of that Chapter." In the case before us, proceedings were initiated under section 105, which is mentioned in sub-sections 1 and 2 of section 109A. Consequently, an appeal lies to this Court from the

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decision of the special Judge, provided his decision is not "a decision settling a rent."

To determine the precise scope of this expression, it is necessary to examine briefly the scheme of Chapter X of the Bengal Tenancy Act in which section 109A finds a place. This chapter is divided into four parts: The first part, which treats of the preparation and publication of record-of-rights, comprises sections 101 to 103B. The second part contains sections 104 to 104J and deals with questions of settlement of rents, preparation of settlement rent-rolls, and disposal of objections, in cases where a settlement of land revenue is being or is about to be made. The third part, which includes sections 105 to 109A, treats of settlement of rents and decision of disputes in cases where a settlement of land revenue is not being or is not about to be made. The fourth part, which covers sections 109B to 115A embodies supplemental provisions. Consequently, when a record-of-rights has been prepared and finally published under sub-section 2 of section 103A, if, as in the case before us, a settlement of land revenue is not being or is not about to be made, it is open to the parties, landlord or tenant, to initiate proceedings, either under section 105 or under section 106. Section 106 enables them to institute a suit before a Revenue Officer to challenge the correctness of the entries made in the record-of-rights. This may be regarded as the procedure for a direct challenge of the entries in the record. If a proceeding is, on the other hand, instituted under Sec. 105 for a settlement of the rent by the Revenue Officer, the duty is cast upon him to settle a fair and equitable rent in respect of the land held by the tenant. Such a proceeding may follow the result of a suit, if any, instituted under section 106, or recourse may be had to it without the prior institution of a suit under that section. In the latter event, there may be an indirect challenge of the correctness of the entries in the record-of-rights. The provision for this contingency is embodied in section 105A, which authorises the investigation of specified particulars in the course of settlement of a rent under section 105, provided there has been no prior decision upon those questions in a suit under section 106.

The history of the introduction of section 105A, which was explained in the judgment of the Full Bench in *Pirthichand Lal Chowdhry v. Basarat Ali* (1), and later on summarised in *Paltoo Pandey v. Newas Prosad* (2), throws light upon the solution of the question

(1) (1909) I. L. R. 37 Calc. 30; 10 C. L. J. 343.

(2) (1913) 18 C. W. N. 165.

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raised before us. It was pointed out in these cases that although section 105 did not by itself, in its original form, contemplate an investigation into the question of correctness of the entries in the record-of-rights, yet a practice had grown up in proceedings under that section to decide questions which, the legislature contemplated, should be determined by a suit under section 106. To put the matter in another way, the parties were placed in the same position as if a suit under Sec. 106 and a proceeding under section 105 had been simultaneously instituted and consolidated, and an amalgamated trial held for the investigation of the question of fair and equitable rent. This led to the enactment of section 105A which regularises the practice that had gradually developed ; and the revenue officers, while seized of proceedings under section 105, were expressly authorised to determine questions mentioned in section 105A which, in the ordinary course, would form the subject of an enquiry under section 106. This conclusively answers the objection suggested in the course of the argument that the Settlement Officer in the case before us had no jurisdiction to determine the question of excess area : *Pattoo Pandey v. Nervas Prosad* (1). It follows accordingly that if, in any proceeding under section 105, questions under section 105A have been investigated and determined, the order of the Settlement Officer, though in form an order which settles a fair and equitable rent, does in substance embody a decision of questions within the scope of section 105A and consequently, of section 106. If the order is of that description, we cannot reasonably hold that the decision of the Settlement Officer is a decision merely settling a rent within the meaning of section 109A ; and consequently not liable to be challenged by way of second appeal to this Court. We cannot be invited to sacrifice substance to form, to look merely at the label and not the contents of the adjudication. If the question specified in Sec. 105A. had been decided in a suit under Sec. 106, the determination by the revenue authorities would not be final ; the appellate decision of the Special Judge would be liable to be tested in second appeal to this Court. It cannot, on principle, make any difference that those very questions have been determined, on the very same authority, in a proceeding under Sec. 105. This view is amply borne out by the Proviso to Sec. 109A which contemplates the possibility of interference by the High Court with the determination, by the Revenue Officer and the Special Judge, of the particulars essential for a settlement of fair and equitable rent. In the case before us, the substantial

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question in controversy between the parties was, whether the tenant was liable to pay rent in respect of what may be compendiously called "excess land." The case for the landlord was that the area in the occupation of the tenant exceeded the area mentioned in the contract of tenancy. The landlord, consequently, claimed assessment of rent on the difference between these two areas and prayed that a fair and equitable rent might be settled in respect of all the lands in the holding. The tenant repelled the suggestion that he was in possession of excess lands. The settlement officer came to the conclusion that the tenant was in occupation of excess area, in other words, that the area in his occupation exceeded the area for which rent had hitherto been paid by him; and he assessed fair rent on this basis. Upon appeal, the Special Judge has reversed that decision. Consequently, although the decision of the Special Judge has settled a fair and equitable rent, it has also determined a question of fundamental importance to the parties, namely, what are the lands liable to be assessed with fair and equitable rent; clearly, a second appeal is not barred with regard to the determination of the latter question.

The distinction I have just explained was recognised as early as 1897 in *Mathura Mohun Lahiri v. Uma Sundari Debi* (1) where a question arose, whether the tenant was in occupation of excess land. The answer depended upon the determination of the length of the standard pole used for measurement of the land.

The Court of first instance went into this question and came to a finding, but upon appeal, the Special Judge declined to investigate the matter. This Court held that a second appeal was competent, as the question was, in essence, not of fair and equitable rent, but of the area of the land included in the tenancy. Mr. Justice Macpherson observed that the appeal did not raise any question as to what the fair and equitable rent was, but it did raise questions as to a matter which must be decided before the settlement officer could settle the amount of rent payable, namely, the area of the land in respect of which the landlord was entitled to have the rent assessed. This view was followed in the cases of *Rajkumar Pratap Sahay v. Ram Lal Singh* (2), *Akbar Ali Mian v. Mussamat Hira Bibi* (3), *Lukhi Narain v. Sri Ram* (4), and *Paltoo Pandey v. Newas Prosad* (5). The same principle underlies the decision of the Full

(1) (1897) I. L. R. 25 Calc. 34.

(2) (1907) 5 C. L. J. 538.

(3) (1912) 16 C. L. J. 182.

(4) (1911) 15 C. W. N. 921.

(5) (1913) 18 C. W. N. 165.

Bench in *Pirthichand Lal Chowdhry v. Basarat Ali* (1), where the Courts below had decided a question falling within the scope of clause (c) of section 105A, namely, a question as to the status of the tenant.

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It has been argued, however, that a different view was taken in *Shewbarat Koer v. Nirpat Roy* (2), *Lala Kirut Narain v. Palukdhari Pandey* (3), *Rameswar Singh v. Bhooneswar Jha* (4) and *W. M. Grant v. Ram Rekha Bhagat* (5). In my opinion this contention is based upon an erroneous interpretation of the decisions mentioned. The case of *Shewbarat Koer v. Nirpat Roy* (2), plainly indicates that the question raised there related to the rent settled and not to matters now included in section 105A. This is emphasised in *Lala Kirut Narain v. Palukdhari Pandey* (6), where Mr. Justice Ghose expressly stated that no question arose before him as to the particulars entered in the record-of-rights; in fact the question related exclusively to what was the fair and equitable rent. This, so far as I can gather, was also the view adopted in *Rameswar Singh v. Bhooneswar Jha* (4) and *W. M. Grant v. Ram Rekha Bhagat* (5). I feel no doubt accordingly that the question propounded for the decision of the Full Bench should be answered in the negative.

As regards the merits, it has been argued that Chapter XLII of the Civil Procedure Code of 1889 mentioned in sub-section 3 of section 109A, which has now been replaced by section 100 of the Civil Procedure Code of 1908, effectively bars the present appeal. There is plainly no force in this contention. Sub-section 3 of section 109A merely provides that if the appeal is otherwise competent, it is to be heard as an appeal from appellate decree, subject to the rules laid down in that behalf in the Civil Procedure Code; in other words, this Court can interfere in an appeal of this description, only if the decision of the lower appellate Court involves an error of law. In this connection, our attention has been drawn to a passage in the judgment of the Special Judge where he states that the tenant was not in occupation of any excess land. At first sight, this may bear the appearance of a finding of fact not successfully assailable in second appeal. But upon closer examination, it appears that the finding involves an error of law. The Special Judge has held in substance that the tenant is not in occupation of excess land, be-

(1) (1909) I. L. R. 37 Calc. 30.

(2) (1889) I. L. R. 16 Calc. 596.

(3) (1889) I. L. R. 17 Calc. 326.

(4) (1906) 4 C. L. J. 138.

(5) (1910) 14 C. L. J. 110.

(6) (1889) I. L. R. 17 Calc. 326 (328).



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cause he must be deemed under his contract to be in occupation of the area mentioned therein. This overlooks the fundamental point that the contract itself provides that the landlord will be at liberty to re-measure the lands. The lands have been actually re-measured in the settlement proceedings under Chapter X of the Bengal Tenancy Act, and the landlord claims assessment of fair rent on the area so determined by the revenue authorities, which must, *prima facie*, be deemed correct under section 103B. The tenant defendant might possibly, either by the institution of a suit under section 106 or by way of objection in this very proceeding, have established that the entry in the record-of-rights was erroneous ; but he has not done so. Consequently the landlord was entitled to have fair rent assessed on the basis of the area as found by the Settlement Officer, and this was the view accepted by him.

In my opinion, this appeal must be allowed, the decree of the Special Judge reversed and that of the Settlement Officer restored with costs throughout.

**Holmwood, J.**—I agree with the judgment delivered by the learned Chief Justice that in the case before us a second appeal does lie under section 109A. I am of opinion that each case must depend on its own circumstances and that no general rule can be laid down as to what is or what is not a decision merely settling a rent. But it is clear that whatever is found in any case to go beyond that simple decision and to decide any of the particulars referred to in section 105A or section 106 of the Bengal Tenancy Act is open to second appeal. I also agree with my learned brother Mookerjee that there is no real conflict in the decisions that have been cited before us on either side.

I therefore agree that the appeal should be allowed and the judgment and decree of the Settlement Officer restored with costs.

**D. Chatterjee, J.**—I agree in answering the question referred to us in the negative. I think the proviso to section 109A supplies an important clue to the explanation of the bar to second appeals imposed in clause (3) of the section. This proviso is to the effect that if in a second appeal the High Court alters the decision of the Special Judge in respect of any of the particulars with reference to which the rent of any tenure or holding has been settled, the Court may settle a new rent for the tenure or holding &c. This therefore contemplates the case of appeals to the High Court lying in cases in which rents have been settled, not against the order settling the rent but against the decision of the Court upon the particulars in respect of which the order for settling the rent has

been passed. In view of this distinction made by the section itself the controversy that appeals against orders resulting in the settlement of rent are barred does not seem to be sound.

Then with regard to the merits of the case it has been contended that there is a finding of fact which will prevent our interference in second appeal. That finding of fact is that the tenant is not in possession of excess lands. This to my mind, upon the facts of this case is an apparent finding of fact but based upon an erroneous view of the legal rights of the parties as determined by the contract entered into by them and is therefore liable to examination in second appeal.

A. T. M.

*Appeal allowed.*

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1916.

Jnanada

v.

Amudi.

*D. Chatterjee, J.*

## CIVIL RULE.

*Before Mr. Justice D. Chatterjee and Mr. Justice Chapman.*

DWARKA NATH SEN

*v.*

TARA PRASANNA SEN AND OTHERS\*

CIVIL.

1914.

*December, 14.*

*Application to District Judge for transfer—Judicial Officer, allegation against—Transfer, order of—Notice to the judicial officer and opposite party—Order of transfer without such notice, if valid.*

A District Judge cannot, upon a mere allegation of a party to a suit that a judicial officer presiding over a Court is interested in the case, direct the case to be tried by a different Court, without giving notice to that judicial officer and the party interested in opposing the application.

Civil Rules obtained by the Plaintiff.

Two suits were brought by the plaintiff in the Court of the 1st Munsiff at Narail, District Jessore, against the defendants for declaration of right of way and removal of obstruction to way. The suits having been decreed *ex parte*, defendant No. 1 made two applications for rehearing before the said Munsiff. The learned Munsiff thereupon wrote to the District Judge that subsequently to the trial of the original cases he had come to know that a friend of his was

\*Civil Rules Nos. 802 and 803 of 1914, against the order of P. K. Chatterjea, Esq., District Judge of Jessore, dated the 17th July, 1914.

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1914.

Dwarkanath  
v.  
Tara Prasanna.

interested in them, and he would rather not try them ; and that the 3rd Munsiff of the place was also similarly interested ; and he requested that the case might be transferred to the 2nd Munsiff. Defendant then made an application to the District Judge stating that the 2nd Munsiff was also interested in the cases ; and the learned District Judge without giving any notice either to the plaintiff or to the Munsiff against whom the allegation was made, passed orders transferring the cases to the Court of the 3rd Munsiff at Jessore. The plaintiff then applied to the District Judge for setting aside the orders passed by him as being without jurisdiction ; and the learned District Judge holding that he could transfer the cases *suo motu*, and that notice to opposite party was not necessary, refused plaintiff's applications. Plaintiff then moved the High Court and obtained the Rules.

*Babus Jogendra Chandra Ghose and Smritish Chandra Ghosh* for the Petitioner.

*Babu Brojo Lal Chackravarti* for the Opposite Party.

The judgment of the Court was as follows :—

December, 14.

These two cases arise out of two applications for re-hearing made before the 1st Munsiff of Narail. On the 14th May, 1914, the 1st Munsiff wrote to the District Judge of Jessore that subsequently to the trial of the original case he had come to know that a friend of his was interested in the case and that he would rather not try these cases. He also said that he understood that the 3rd Munsiff was also similarly interested. He therefore requested that the case might be transferred to the Court of the 2nd Munsiff. On the 20th of May the defendant made an application to the District Judge stating that the 2nd Munsiff was also interested ; and without any notice to the plaintiff the learned District Judge passed an order transferring the case to the 3rd Court of the Munsiff at Jessore. The order made is objected to and we think rightly objected to on two grounds. The first is that the petitioner before the learned District Judge was allowed to make an allegation against a judicial officer and although neither that judicial officer nor the party interested in opposing the application had any notice of the application, an order was passed for the transfer of the case ; and secondly that no order ought to have been passed for transfer without notice to the plaintiff as it was a matter in which the convenience of the parties was of very great importance. We think that both these grounds are of substance and ought to prevail. The plaintiff complains that he would be under very great inconvenience if the cases are transferred to Jessore ; that may probably be. Besides, the statements made with

regard to the 2nd Munsiff of Narail have not been made a subject-matter of enquiry or investigation. In any case we think, that this is a case in which the order for transfer should not have been made without notice to the plaintiff.

We set aside the order of transfer and send back the cases to the learned District Judge in order that he may dispose of them after hearing the plaintiff and also considering the objection that circumstances have changed since the last order was passed.

We make no order as to costs.

A. N. R. C.

*Rules made absolute.*

CIVIL.

1914.

Dwarka Nath  
v.  
Tara Prasanna.

*Before Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.*

MOHESH CHANDRA ADDY

v.

PANCHU MUDALI.\*

CIVIL.

1915.

December, 3, 22.

*Vakalatnama—Pleader, acceptance by—Acceptance, if to be in writing—Pleader subsequently appearing—Civil Procedure Code (Act V of 1908), O. III R. 4—High Court General Rules and Circular Orders, Ch. XI, R. 45 (e), Vol. I., p. 301, interpretation of.*

*Per D. Chatterjee, J.:*—An appearance or act by a pleader named in the *vakalatnama*, if allowed by the Court expressly or by implication, would be valid and operative, as O. III R. 4 of the Code of Civil Procedure does not require that the acceptance of a *vakalatnama* should be in writing.

Rule 45(e), Chap. XI, p. 301, Vol. I., General Rules and Circular Orders (Ed. 1910) of the High Court, requiring acceptance of a *vakalatnama* by endorsement in writing, should be complied with by the pleader in the *Mofussil* who first accepts it, as it is a salutary rule prescribed for safe-guarding the interests of litigants. All subsequent acceptances must be made by endorsements done in the presence of the Court or the *sheristadar* or the Bench officer and dated, provided all the pleaders so accepting a *vakalatnama* are named in it. Courts in the *Mofussil* should be specially careful in enforcing this rule in cases of compromise and withdrawal of cases and withdrawal of money and documents.

*Per Beachcroft, J.:*—Although there may be an acceptance, as between party and pleader, other than in writing, if the High Court Rules require that a pleader is to sign the *vakalatnama* or make any particular endorsement on it, the Court

\* Civil Rule No. 662 of 1915, in the matter of Small Cause Court Suit No. 25 and Miscellaneous case No. 60 of 1915, arising out of Small Cause Court Suit No. 71½ of 1915 of the Court of the Munsif, 2nd Court, Puri, exercising the powers of a Court of Small Causes.

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before which the pleader practises should insist on the rule being observed, before it allows him to plead.

*Quære*, whether after the first endorsement, a mere endorsement of acceptance is sufficient in the case of pleaders subsequently appearing.

Application by the Plaintiff.

Application for revision under section 25 of the Provincial Small Cause Courts Act.

The material facts and arguments appear from the judgment of Mr. Justice D. Chatterjee.

*Babu Satya Charan Sinha* for the Petitioner.

*No one* appeared for the Opposite Party.

C. A. V.

The judgments of the Court were as follows :

December, 22.

**D. Chatterjee, J.**—The whole trouble in this case is due to a misunderstanding and some uncertainty of practice in the acceptance of Vakalatnamas in the Mofussil.

The facts are that the petitioner filed a suit in the Small Causes Court at Puri in charge of the Second Munsiff and engaged three pleaders Babus Poorna Chandra Addy, Raj Kishor Das and Jogendra Chandra Mitra. Baboo Poorna Chandra accepted the vakalatnama by endorsing his name on its back as usual. The two other pleaders did not sign the Vakalatnama. On the date of hearing Babu Jogendra Chandra signed the *hajira* of witnesses and Baboo Raj Kishore attempted to conduct the case by offering to examine the witnesses. There is some difference between the petitioner and the learned Munsiff as to what then took place. The learned Munsiff says he asked Raj Kishore Babu to accept the vakalatnama on the record, the petitioner says Raj Kishore Babu was asked to file a fresh vakalatnama. I take the facts as stated by the learned Munsiff to be correct especially as there is no affidavit by the Pleader and the *karpardaz*, who swears the affidavit, does not know English and could not have understood what was said. But I can not conceive why Raj Kishore Babu should have allowed the case to be dismissed for default unless he misunderstood the order of the Court and thought that he was required to file a fresh vakalatnama which he could not do as his client was absent. As it is I think there was some such mistake and the case was dismissed for default and Babu Jogendra Nath who had filed the *hajira* without signing the vakalatnama was given a notice to show cause why he should not be proceeded against under the Legal Practitioners Act. There was then an application for rehearing

but that also ultimately failed as on the date of hearing an application for postponement was made by the agent of the client acting under a special power of attorney which was not registered. There is no provision in the Registration Act which makes the Registration of a special power of attorney compulsory but the Court is not bound to presume its genuineness unless it is registered. See section 85 of the Evidence Act and the learned Munsiff was within his rights in refusing to act upon the application of the agent. As regards the acceptance of vakalatnamas the practice in the High Court is that one or more vakils endorse their acceptance on the vakalatnama before it is filed, and if any other vakil named in the vakalatnama wants to accept it later, he makes his endorsement before the Deputy Registrar or his assistant and the endorsement is initialled by the said officer and dated. Vakils who are engaged later generally endorse their acceptance when the record is in the Bench but many vakils work without endorsing their acceptance unless the omission is brought to their notice.

Order III R. 4 of the Civil Procedure Code does not expressly say that the acceptance of the vakalatnama should be in writing and it was held by Banerjee, J. in 1901, in the case of *Shama Prosad Ghose v. Taki Mullik* (1) that under similar provisions of section 39 of the old Code, no writing was necessary for the acceptance of a vakalatnama and it was sufficient if the Vakil acting was named as one of those authorised in the body of the vakalatnama. This matter came before the English Committee of this Court in April 1910 upon a reference from the District Judge of Khulna and the learned Judges (Sir Lawrence Jenkins, C. J., Harington J., Bret J., Mookerjee J. and Carnduff J.) directed the Registrar to say that O. III R. 4 does not require the acceptance of a vakalatnama to be in writing. The matter came up again in 1914 upon a reference from the District Judge of Tipperah and the same answer was given. The letter of the Registrar in that case is printed in 19 C. W. N. xxvi. The file shows that Rule 45 (e) of the High Court Rules and Circulars published in 1910 was referred to by the District Judge. It appears however from enquiries made from the Registrar of the Appellate Side that the answer was given in accordance with the precedent in the Khulna case, without placing the matter before the English Committee again. The next reference was by the District Judge of Cuttack in 1915 made in consequence of a representation from the Puri Bar Association objecting to an order of the 2nd Munsiff of Puri directing that every acceptance of

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(1) (1901) 5 C. W. N. 816.

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*D. Chatterjee, J.*

*vakalatnama* must be in compliance with Rule 45 (e), chapter XI, p. 301, Vol. I General Rules and Circular Orders (Ed. 1910) whether it is before or after the *vakalatnama* is filed and the same answer was given directing that in case of a subsequent acceptance by a new pleader of a *vakalatnama* previously filed by another pleader, the date of the acceptance should be added. This answer was also given by the Registrar on the authority of the Khulna case without any fresh consideration by the English Committee. All these references however deal with the case of several acceptances of the same *vakalatnama* by several pleaders at different times, and none of them deals with the case of a pleader acting without accepting the *vakalatnama* in writing. I think that O. III R. 4 Civil Procedure Code does not require that the acceptance of a *vakalatnama* should be in writing.

An appearance or act therefore by a pleader named in the *vakalatnama* would, if allowed by the Court expressly or by implication, be valid and operative. The High Court Rule however was made to be followed and is a salutary rule prescribed for safeguarding the interests of litigants and should certainly be followed in the *Moffusil* in the manner indicated by the construction placed on the same in the answers to the several references. It must be fully complied with by the pleader who first accept the *vakalatnama* and all subsequent acceptances must be made by endorsements made in the presence of the Court or the Sheristadar or the Bench Officers and dated, provided of course all the pleaders so accepting a *vakalatnama* are named in it. Courts in the *Moffusil* must be specially careful in enforcing this rule in cases of compromise and withdrawal of cases and withdrawal of money and documents.

There was evidently a misconception in this case. Raj Kishore Babu retired as he probably thought he was required to file a fresh *vakalatnama* which he was not in a position to do and the learned Munsiff held that "Babu Jogendra Nath who had filed the *hajira* had no authority from the plaintiff to file the same." As I have shown above Baboo Jogendra Nath had been duly authorised by the *vakalatnama* to represent the plaintiff and had signified his acceptance of the same by acting as aforesaid and would presumably have put down his signature on the *vakalatnama* if the omission had been brought to his notice. I therefore make the Rule absolute and direct that the case be restored to the file and tried in due course of law.

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**Beachcroft J.**—The petitioner obtained this Rule mainly on the strength of allegations in the affidavit to the effect that the learned Munsiff sitting as judge of the Small Causes Court would not allow his pleader Babu Raj Kishore Dass to examine his witnesses, as the pleader had not accepted the vakalatnamah already filed, and directed the pleader to file a fresh vakalatnama, which the pleader was unable to do in the absence of the petitioner, in consequence of which the suit was dismissed for default. In support of the Rule it has been argued that O. III R. 4 of the Civil Procedure Code does not require the acceptance of the pleader to be in writing. In addition to the opinion expressed by Banerjee J. in *Shama Prosad Ghose v. Taki Mullik* (1) to the effect that acceptance need not be in writing reliance was placed on an article in 19 C. W. N. p. xxvi in which it was alleged, quoting the letter of the Registrar of the Appellate Side of this Court, that the High Court refused to accept a recommendation of the District Judge of Tipperah, that all the pleaders who wished to appear in a case must sign the vakalatnama before it is filed in Court. In fact it appears that the recommendation of the District Judge of Tipperah was not brought to the notice of the Judges, but was dealt with by the Registrar on the precedent of an answer given to the District Judge of Khulna in 1910. On that occasion an enquiry by the District Judge was considered by the English Committee and an answer was sent based on the opinion expressed by Banerjee J. It does not appear, however, that any reference was made to Rule 45 (e) in Chapter XI of the Court's General Rules and Circular Orders, a rule which had been made subsequently to the decision in *Shama Prosad Ghose v. Taki Mullik* (1).

That Rule requires that a pleader accepting a vakalatnama shall note on it the name of the person from whom it has been received with an endorsement to the effect that he is satisfied that the person from whom he received it is either the party himself or a certificated mukhtar or one who has been authorised by the party to deliver it to him as the case may be. The learned Munsiff appears to be of opinion that the introduction of this rule has had the effect of making acceptance in writing obligatory by a pleader accepting a vakalatnama. I do not think that that is the effect of the rule. I am of opinion that there can still be an acceptance by the pleader other than in writing. But if this Court has, in the exercise of its powers framed certain rules which must be observed by pleaders, a pleader who does not conform to



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those rules ought not to be heard. Although there may be an acceptance, as between party and pleader, other than in writing, if the rules require that a pleader is to sign the vakalatnama or make any particular endorsement on it the Court before which the pleader practised ought to insist on the rule being observed, before it allows him to plead.

Coming to the facts of this particular case I am certainly not prepared to accept the allegation that the Munsiff asked the pleader to file a fresh vakalatnama. The learned Munsiff has sent an account of what happened viz. that he asked the pleader if he had accepted the vakalatnama already filed, the pleader replied that he had not, the Munsiff then told the pleader that if he accepted it he might appear, otherwise not, and the pleader did not accept the vakalatnama. I will assume in favour of the petitioner that when the Munsiff speaks of acceptance he refers to the making of such endorsements as are required by rule 45 (e) already referred to.

The Munsiff's account of what happened concludes the matter. But in any case even if the Munsiff had not denied the allegation in the affidavit, there would be nothing before us to justify the view that the Munsiff had asked for a fresh vakalatnama. The affidavit is sworn by a person who does not know English, while the conversation in Court took place in English, and the affidavit is in the qualified form "the facts stated are true to the best of my knowledge," without any information as to the source of the knowledge. Affidavits thus qualified are constantly being made and it is as constantly pointed out that the qualification renders the affidavit useless as evidence of any particular fact.

Nor am I prepared to take the view that the pleader misunderstood what the learned Munsiff said. The pleader himself does not say so. I know that there is a general objection among the members of the profession to swearing affidavits, an objection for which in many cases there is no justification. I can well understand a pleader objecting to swear an affidavit if that involves his alleging facts which throw discredit on the conduct or work of a judicial officer in whose Court he has to practise, but I do not see what considerations can stand in the way of his saying if true, that he was mistaken in what the judicial officer said. Now far from there being any misunderstanding in this case, there is every reason for thinking that the Munsiff wanted the pleader to make the endorsement required by Rule 45 (e) and that the pleader deliberately refused to make it.

It is clear from the papers before us that the Munsiff has been trying to enforce the complete observance of the rule not only by the first pleader accepting a vakalatnama, but by those appearing on the strength of the original vakalatnama at subsequent stages of the case, while the members of the bar have maintained the position that after the first endorsement, a mere endorsement of acceptance is sufficient in the case of pleaders subsequently appearing and there is no doubt that there was, for I understand that the learned Munsiff has been transferred,—considerable friction between him and the members of the Bar. It is not necessary, nor have we the materials, to attempt to apportion the blame for this state of affairs, but apparently both sides held their ground, and I believe the present incident was merely an outcome of this difference of opinion. Incidentally I may observe that this state of things led to a reference by the District Judge to this Court which was unfortunately disposed of by the Registrar on the authority of the reply given to the District Judge of Khulna, though the point referred was an entirely new one.

It is not necessary in the present case to decide which of the two views of rule 45 (e) advanced is the correct one, though there is something to be said in favour of both.

What does concern us in the present case is whether we ought to interfere with the order dismissing the suit. It is true no doubt that we have on the one hand an affidavit giving a garbled account by a person who was not in a position to understand what actually took place : perhaps he was misled. On the other hand it is hardly fair to make the litigant suffer for a difference of opinion between the Court and the pleader as to the latter's duties.

I therefore agree to the order proposed by my learned brother.

A. T. M.

*Rule made absolute.*

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*Beachcroft, J.*

# FULL BENCH.

*Before Sir Lancelot Sanderson, Knight, K. C., Chief Justice, Sir John Woodroffe, Knight, Judge, Sir Asutosh Mookerjee, Knight, Judge, Sir Herbert Holmwood, Knight, Judge, and Mr. Justice D. Chatterjee.*

CIVIL.

1916.

February, 7.

PURNA CHANDRA TRIVEDI AND OTHERS

v.

CHANDRA MOHINI DASSI AND OTHERS.\*

*Ejectment—Non-transferable occupancy holding—Purchaser of a share.*

A purchaser of a share of an occupancy holding, is entitled to possession even as against the landlord, inasmuch as the tenancy is not determined and interposes a barrier between him and the landlord.

*Dayamayi v. Ananda* (1) followed.

Appeal by the Plaintiffs.

Suit to recover *Khas* possession.

Plaintiffs Nos. 2 and 3 were tenants in respect of one-half only of an occupancy holding which was not transferable and the plaintiff No. 1 purchased their interest in execution of a mortgage decree against the former. The allegation of the plaintiff No. 1 was that his vendors and mortgagors were in exclusive occupation of specific lands described in the plaint as representing the half share which he subsequently acquired. This was not admitted by the contesting defendant, who set up a case of joint possession of all the lands of the holding by the joint tenants. The defendants were landlords.

The primary Court dismissed the suit on the ground that the plaintiffs had no valid title to the holding, as plaintiff No. 1 was not able to secure the consent of the landlord. This decree was affirmed on appeal. On appeal to the High Court, Richardson and Mullick JJ. referred it to a Full Bench by the following

## Order of Reference.

The plaintiff No. 1, in execution of a mortgage decree against the plaintiffs Nos. 2 and 3, purchased their share of a non-transferable occupancy holding. He then purchased the remainder of the holding by a private sale and sublet the holding to the plaintiffs Nos. 2 and 3.

\* Full Bench Reference in Appeal from Appellate Decree No. 2417 of 1913, against the decree of E. Panton Esq., District Judge of Mursidabad, dated the 24th April, 1913, affirming that of Babu Durgadas Chakrabarty, Munsiff of Kandi, dated the 28th June, 1912.

(1) (1914) I. L. R. 42 Calc. 172 (222); 20 C. L. J. 52; 18 C. W. N. 971.

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Subsequently the original defendant No. 1, a co-sharer landlord, purchased the right, title and interest of the original tenants in execution of a decree for his share of the rent. Having secured possession, he obtained recognition as tenant from his co-sharers and sublet the land to the defendants Nos. 2 to 6. He died during the course of the suit and is represented by the present defendant No. 1.

The suit was brought by the plaintiffs to recover possession from the defendants.

There is no question of any fraud or collusion between the plaintiffs Nos. 2 and 3, and the deceased defendant No. 1, nor is it suggested that the decree for rent was not fairly obtained. The plaintiffs Nos. 2 and 3, are in the same boat with the plaintiff No. 1. If the point is material there is nothing to show that the deceased defendant No. 1, had any notice or knowledge of the transactions between the plaintiff No. 1, and the original tenants.

The sole question in controversy has been whether on the facts stated the title shown by the plaintiffs is sufficient to justify a decree for possession in their favour. Both Courts below have concurred in answering this question in the negative and dismissing the suit. The appellants before us are therefore the plaintiffs. The main contention being between the plaintiff No. 1, and the successor of the original defendant No. 1, it will be convenient in what follows to speak of the plaintiff No. 1, as the plaintiff, and the original defendant No. 1, as the defendant.

It is common ground that what the defendant purchased in execution of his decree was the right, title and interest of the original defendants. That being premised, the arguments available on either side may be thus summarized.

The plaintiffs' case is in effect that the defendant brought his suit for rent as a co-sharer landlord and must take the consequences. All he could sell in execution was merely the right, title and interest of the tenants. That was sold and bought and the defendant could not afterwards claim to have purchased anything more than that nor could he enlarge his rights by obtaining recognition from his co-sharers. It followed that the defendant bought subject to the rights which the plaintiff had acquired as against the tenants.

For the defence it was conceded that the defendant bought in the first instance subject to the plaintiffs' rights, but that, it was said was not a complete answer to the defendants' plea because it entirely left out of account the limitations or initial infirmity of the plaintiffs' title. No doubt according to the recent decision of the Full Bench

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in *Dayamayi's case* (1), the plaintiffs' title was good against all the world except the landlords. But, it was urged, the defendant was a landlord, and in conjunction with his co-sharers he was at liberty to refuse to recognize that title. If in view of the provisions of clause (2) of section 22, of the Tenancy Act it was necessary for the defendant to obtain recognition as tenant from his co-sharers, it had been found that he had secured such recognition. 'He was perfectly at liberty to take that step and the result was the same as if the purchaser at the execution sale had been the whole body of landlords or as if the whole body acting together had formally refused to recognize the plaintiff as their tenant. There was no equity and no estoppel which the plaintiff could call in aid. The question was: Upon the basis of strict legal right, which party had secured or got in the better title? The answer suggested was the defendant. The plaintiff could not complain because he must be assumed to have known throughout that his title was worthless as against the landlords. It was from the outset a defeasible title. The defendant was relying on the statutory right of the landlords to refuse to recognize the plaintiff as their tenant. The fact of the defendant's purchase did not deprive the landlords of that statutory right. They might have exercised it before the purchase and they could exercise it after the purchase. The purchase made no difference and created no obstacle. No equity could be set up for the purpose of defeating the right which the legislature had conferred on the landlords and in a measure nullifying provisions which must be regarded as embodying the policy of the law. As the Full Bench had held the plaintiff might have had the sale to the defendant set aside by making a deposit under rule 89 of order XXI, of the Civil Procedure Code, but he had not taken that course and his present claim was untenable.

As to authority the cases relied upon on the plaintiffs' behalf were those of *Radha Kant Chuckerbutty v. Ramananda Shaha* (2), and *Ayenuddin Nasya v. Srish Chandra Banerji* (3). In the former case there was a difference of opinion between Chitty, J. and Cox, J. and the case was referred to Digambar Chatterji, J., who delivered the final judgment. It may be within the bounds of possibility to distinguish that case on the ground that there the co-sharer landlord claimed under a voluntary or private sale, and not under a forced sale. Some distinction between sales of

(1) (1914) 20 C. L. J. 52; I. L. R. 42 Calc. 172.

(2) (1912) 15 C. L. J. 369; 16 C. W. N. 475; I. L. R. 39 Calc. 513.

(3) (1906) 11 C. W. N. 76.

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the one kind and sales of the other seems to have been adopted by Digambar Chatterji, J. as the basis of his decision. He distinguished the previous case of *Bibi Asmatunnessa v. Harendra Lal Biswas* (1), on the ground that in a forced sale the mortgagor does not co-operate with the purchaser for creating a title in derogation of the mortgage. The latter case in the respect indicated resembles the present case and it was therefore cited for the defendant. As to *Ayenuddin Nasya's case* (2), there the co-sharer landlord does not appear to have obtained recognition from his co-sharers. The case was decided by Ghose, C. J. and Caspersz, J. Ghose, J. was also a party to the decision in another case cited for the defence, *Krishna Lal Saha v. Bhairab Chandra Rahat* (3). The report is a short one but a reference to the original judgment shows that the report is substantially correct. The defendant then had purchased a non-transferable occupancy holding (upon which there was an outstanding mortgage) in execution of a money decree and had afterwards obtained settlement of the land from the landlord upon the payment of *nazarana*. It was held that he had a good defence to a suit by the mortgagee on the mortgage.

Upon the authorities, therefore, as they stand, the decision of the present case depends upon the validity of the distinction above adverted to. It appears to us however to be extremely difficult to distinguish in principle between those cases in which a co-sharer landlord has bought a holding by private sale and those cases in which he has bought at a forced sale held in execution of a money decree, whether the decree has been obtained by himself or by a third party. In both classes of cases, so far as the co-sharer landlord is concerned he is a voluntary purchaser of the right, title and interest of the tenants and if he cannot take advantage of the landlord's statutory right for the purpose of improving his position and getting in a larger title in the one case no reason occurs to us why he should not be similarly debarred in the other.

That being our view in regard to the authorities we are of opinion that the difficulty of the subject matter and the frequency with which controversies of this kind arise make it desirable that the present case should be referred to a Full Bench.

We accordingly direct that the following question be referred to a Full Bench :

Whether a co-sharer landlord who has purchased a non-transferable occupancy holding in execution of a decree for his share of

(1) (1908) 12 C. W. N. 721.

(2) (1906) 11 C. W. N. 76.

(3) (1905) 2 C. L. J. 19 n ; 9 C. W. N. cclxviii.

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the rent is competent to question the validity of the title of a previous transferee of the holding from the tenant, such transfer not having been recognized by the landlord?

*Babus Nares Chandra Sinha* and *Panchanan Ghose* for the Appellants.

*Babu Soroshi Charan Mitter* for the Respondents.

The judgments of the Court were as follows :

February, 7.

**Sanderson, C. J.**—In this case the reference to us by the two learned Judges, which is set out at page 4 of the paper book, is "whether a co-sharer landlord who has purchased a non-transferable occupancy holding in execution of a decree for his share of the rent is competent to question the validity of the title of a previous transferee of the holding from the tenant, such transfer not having been recognized by the landlord."

In my judgment, and I think all my learned brothers agree, apparently there has been a misconception of the facts of this case, and when they are correctly appreciated, the point which is involved in this reference does not arise at all, because it now appears that the plaintiffs Nos. 2 and 3 were tenants in respect of one-half only of an occupancy holding which was not transferable and the plaintiff No. 1 has purchased their interest. Therefore, the most the plaintiff No. 1 has purchased is the one-half share only, and under those circumstances there are other people who are holders of the other half-share, and who are entitled to be in possession of the property as against the landlord, and therefore the landlord had no right to take possession of the property. Consequently, the point which has been referred to us does not arise. The course which this Court thinks is the proper one is to remit this case to the District Judge in order that he may deal with the other points which may arise in the case. See page 9 of the paperbook where the Munsiff who tried the case says: "The other points need no discussion after the above finding." There are evidently other points which may have to be decided, and the case is remanded for that purpose.

The appellant will have the costs of this hearing and of the Division Bench.

**Woodroffe, J.**—I agree.

**Mookerjee, J.**—The question referred to the Full Bench for decision has been framed on a misconception of the actual facts of the case. The order of reference assumes that the first plaintiff acquired the entire holding by the two transactions upon which he relies, namely, first, a purchase at a sale in execution of a mortgage decree

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on the 10th March 1907, and secondly, another purchase under a conveyance on the 14th October, 1907. But, on an examination of the pleadings and the proceedings in the suit, it is plain that, under these transactions the first plaintiff acquired only one-half share of the holding, and this accords also with the finding of the District Judge : In this view, the question referred to us does not arise, and the rights of the parties must be governed by the rules formulated by the Full Bench in *Dayamayi v. Ananda Mohan Roy Chowdhury* (1). That decision shows that the plaintiff, as purchaser of a share of an occupancy holding, is entitled to possession even as against the landlord, inasmuch as the tenancy has not yet terminated and interposes a barrier between him and the landlord.

Consequently, the plaintiff is entitled to recover possession from the landlord, who must be deemed to have wrongfully evicted him from the holding whereof he has purchased a share.

I must add, however, that on the materials before us, we are not in a position to make a decree for possession in favour of the plaintiff, as there has not been up to the present stage, any determination of the question raised in the fifth issue in these terms: "Are the plaintiffs entitled to get  *khas*  possession of the lands in suit?" This issue was framed in these circumstances. The allegation of the plaintiff was that his mortgagor and vendors were in exclusive occupation of specific lands described in the plaint as representing the half share which he subsequently acquired. This was not admitted by the contesting defendant who set up a case of joint possession of all the lands of the holding by the joint tenants. If the allegation of the plaintiff turns out to be true, he will be entitled to a decree for exclusive possession of the land described in the plaint, as representing his half share of the entire holding. If, on the other hand, it turns out that the predecessors in interest of the first plaintiff were in possession, jointly with their co-sharers, of the lands of the co-tenancy, the plaintiff will be entitled to a decree for joint possession of all the lands to the extent of his half share. These are matters which must obviously be investigated before a decree for possession can be framed in favour of the plaintiff. But it must be clearly understood that in the determination of this question, the Court below must proceed on the basis of the finding accepted by us, namely, that the plaintiff has by his purchase acquired a good title to a half share and a half share only of the occupancy holding in dispute.

On these grounds I agree that this appeal must be allowed with

(1) (1914) I. L. R. 42 Cal. 172 (222) ; 20 C. L. J. 52.



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costs and the case remitted to the District Judge in order that the matter may be re-heard on the lines indicated above.

**Holmwood, J.**—I agree with the judgments which have been delivered, and I have no objection to the case going back for the purpose of deciding the fifth issue and other questions which the learned Munsiff held would arise in the suit, if the plaintiffs established their right to obtain possession as against defendant No. 1. But when the case goes back it ought not, in my opinion, to be open to the District Judge to rehear the case upon the question of whether plaintiffs Nos. 2 and 3 are tenants in respect of a portion of the holding or of the whole. Provided the remand is limited to the question which has been enunciated in the judgment of Mr. Justice Mookerjee, I am in entire agreement.

**D. Chatterjee, J.**—I agree.

A. T. M.

*Case remanded.*

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lancelot Sanderson, Knight, K. C., Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.*

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December, 1

RAMESWARI CHAUDHURANI

v.

K. B. DUTT. \*

*Appeal, infructuous—Order—Execution—Appeal, filing of—Stay of execution—Civil Procedure Code (Act V of 1908), O. 41, R. 5, Sub-R. (2)—Court of appeal, duty of—Event, subsequent.*

An order was passed on the 26th April, 1915, by the primary Court, granting leave to the receiver to settle a claim of the estate against a certain person for certain sum. A letter was sent to the receiver on the 1st May by the appellant saying that she was going to appeal from the order and asking him not to take any steps in respect of that order until the appeal was filed. On the following day, the receiver replied that he could not wait indefinitely for the proposed appeal and would proceed to carry out the order, unless an order for stay was obtained from the Court of appeal. The appellant took no steps to file an appeal or to obtain an order for stay of proceedings. The receiver carried out the order, the settlement with the debtor was duly effected, and the

\* Appeal from Original Order No. 50 of 1915, against the order of Mr. Justice Chaudhuri, dated the 26th April, 1915, sitting on the Original Side.

deed of release in his favour was executed and registered on the 10th June, 1915. The present appeal was thereafter lodged on the 23rd June, 1915 :

*Held*, that the appeal had become infructuous by reason of the laches of the appellant.

*Per Mookerjee J.* : That there was nothing to prevent the appellant from obtaining an order for stay, even before the appeal was actually lodged.

That it was incumbent upon a Court of appeal to take note of events subsequent to the order under appeal.

*Hasari Mull v. Janaki* (1) ; *Ramyad v. Bindeswari* (2) ; and *Rai Charan v. Biswa Nath* (3) referred to.†

Appeal by the Objector.

The respondent was appointed receiver of the movable property and of the rents, issues and profits of the immovable property belonging to the estate of Srish Chunder Dass, the testator, with power to get in and collect the outstandings, debts and claims due to the said estate and the effects of the said testator. There was due to the said estate a sum of Rs. 16,650 for principal, Rs. 10,777 5 as. 7½ pies for interest, Rs. 327-5-3 to a mahajani khata of 1317 B. S. and Rs. 1539-11-3 for Fire Insurance premiums for 1914 from one Mr. Manuk on the basis of several hypothecation deeds executed by him. The said respondent stated in his petition, dated the 9th April, 1915, that Mr. Manuk offered him Rs. 15,800 in full of his dues to the estate under the said deeds. He, therefore, prayed to settle the claim for the amount. The Court therefore passed the following order :—

Very well. Liberty to receiver to settle for amount mentioned or to transfer for a sum not less than that amount. Receivers' and defendants' costs of application out of estate.

*Messrs. Pugh and R. L. Roy* for the Appellant.

*Mr. S. K. Chuckerbutty* for the Respondent.

The judgments of the Court were as follows :

**Sanderson, C. J.**—This is an appeal from a judgment of Mr. Justice Chaudhuri which was made on the 26th of April, 1915, whereby he gave leave to the Receiver, Mr. Dutt, to settle a claim of the Estate against a man named Mr. Manuk for Rs. 15,800. A letter was sent to the Receiver on the 1st of May by the executors saying that they were going to appeal from the order of Mr. Justice

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April, 26.

December, 13.

(1) (1907) 6 C. L. J. 92.

(2) (1907) 6 C. L. J. 102.

(3) (1914) 20 C. L. J. 107.

[† See also *Ram Ratan v. Mohant* (1907) 6 C. L. J. 74 and other cases referred to at p. 108 of 20 C. L. J.—Rep.]

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*Sanderson C. J.*

Chaudhuri, and asking the receiver not to take any steps in respect of that order until the appeal was heard. We were at first told that there was no answer to this letter which was a mistake for it appeared that an answer had been sent on the following day, the 2nd of May. A part of the answer has been read out to us by Mr. Chuckerbutty, and it was obviously to the effect that the receiver could not be bound by the terms of the letter and that if the executors wanted to stay the proceedings they must take the necessary steps by applying to the Court. The receiver also gave notice in that letter that he intended to carry out the order of the Court. It appears that on the 10th of June the receiver did effect a settlement with Mr. Manuk—the property was reconveyed to him on that date, the release was signed, and, we are informed, the release was registered on the same date. On the 23rd of June, the very last day which was open to the appellant, this appeal was filed.

Now, to my mind, as soon as the statement that the matter had been settled and the property had been reconveyed was brought to the knowledge of the Court, the time of this Court ought not to be occupied in a further hearing of the appeal, and for this reason: at the time the property was reconveyed and the release granted, the receiver was acting under an order of the Court, which was a perfectly good order at the time, and under that order Mr. Manuk, who was not a party to the suit, obtained possession of the property. Not only that: We are informed that he has in fact parted with it to another individual altogether. Therefore, if we were to reverse this order,—I do not say for a moment that on the merits this is an order which ought not to have been made and we ought to reverse it, but supposing we did, our order would have no effect: We shall have no jurisdiction to order Mr. Manuk to reconvey the property to the receiver, and therefore it seems to be quite useless and mere waste of time for this Court to go on discussing the point which has been urged by the appellant. I may say that if there is any injustice or any harm done to any body, it is entirely the fault of the appellant, because after the warning which he received from the receiver, the obvious thing for him to do was to file an appeal at once and then to come to this Court and make an application to the Court to restrain the receiver from acting upon the order of Mr. Justice Chaudhuri until the hearing of the appeal. Had this course been adopted, the receiver would not have thought of proceeding with the order of Mr. Justice Chaudhuri. But that obvious course was not adopted: On the contrary, the matter was left until the very last day which was open to the appellant, namely, the 23rd of June.

Under these circumstances, I think this appeal should be dismissed.

The costs of both parties will come out of the estate.

**Woodroffe, J.**—In order to make out a claim for relief the appellant should at least have applied for a stay order which the receiver invited her to get if she was dissatisfied with the Judge's order. Without expressing any opinion on the merits or whether an appeal lies I think the matter comes too late. For this reason I agree that the appeal should be dismissed.

**Mookerjee, J.**—I agree that the appeal has become infructuous by reason of events which have happened since the order of the 26th April, 1915, and should not consequently be entertained. In my opinion, this appeal falls within the class of cases where it is incumbent upon a Court of appeal to take note of events subsequent to the order under appeal: *Hazari Mull v. Janaki* (1); *Ramyad v. Bindeswari* (2); *Rai Charan v. Biswa Nath* (3).

On the 26th April, 1915, the trial Court granted leave to the receiver to enter into the proposed settlement with the debtor, and to execute in his favour a release in respect of the hypothecated property. On the 1st May, the present appellant, who had unsuccessfully opposed the application of the receiver, intimated to the latter that he intended to appeal against the order and requested him not to carry out the order meanwhile. On the following day, the receiver replied that he could not wait indefinitely for the proposed appeal and would proceed to carry out the order, unless an order for stay was obtained from the Court of appeal. Notwithstanding this clear intimation, the appellant took no steps to file an appeal or to obtain an order for stay of proceedings. The receiver carried out the order, the settlement with the debtor was duly effected, and the deed of release in his favour was executed and registered on the 10th June, 1915. The present appeal was thereafter lodged on the 23rd June, 1915. The excuse offered is that the order itself was not filed till the 11th June, 1915; that merely shows, however, that the appeal was filed within the time allowed by law. But, plainly, there was nothing to prevent the appellant from obtaining an order for stay, even before the appeal was actually lodged, as is clear from the principle recognized in order XLI, rule 5, sub-rule 2 of the Code of Civil Procedure. In my opinion, it was the duty of the appellant in the event which had happened, to obtain a timely order for stay. Complications of the gravest character may obviously arise if we entertain the appeal

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(2) (1907) 6 C. L. J. 102.

(3) (1914) 20 C. L. J. 107.

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and set aside the order ; we may prejudice the position of parties who had no notice of the intended appeal. The debtor is not a party to these proceedings, and, we are informed that since the execution of the release, the property has been transferred by him to a stranger who also is not before the Court ; the position might have been different if benefit had been received by one of the parties to the proceeding, who might, on reversal of the order, be called upon to make restitution. It has not been suggested that the receiver and the debtor conspired to rush matters through, with a view to embarrass the Court of appeal in the effective exercise of its jurisdiction ; if such a case had been alleged and made out, it would have been necessary for us to consider what steps we should take so as to ensure that the ends of justice might not be defeated. But no such question arises here. On the other hand, upon the facts before us, it is plain that by reason of the laches of the appellant, the appeal has become infructuous. On these grounds I agree that the appellant has disentitled himself to the assistance of the Court, and that his appeal must be dismissed.

*Mr. S. C. Ghose*—Attorney for the Appellant.

*Mr. D. C. Mitra*—Attorney for the Respondent.

A. T. M.

*Appeal dismissed.*

*Before Sir Lancelot Sanderson, Knight, K. C., Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.*

JOHUR LAIL DE

v.

DHIRENDRA NATH DE.\*

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November, 22, 23, 24

*Will—Revocation—Tearing—Slightest act of tearing, if sufficient—Indian Succession Act (X of 1885), Sec. 57.*

By tearing in section 57 of the Indian Succession Act, is not meant a literal tearing to pieces ; the slightest act of tearing with intent to revoke the whole will thereby, is sufficient for the purpose.

*Per Mookerjee, J.*—A revocation of Will consists of two elements under section 57 of the Indian Succession Act, the intention of the testator and some outward act or symbol of destruction. A defacement, obliteration or destruction without the *animo revocandi* is not sufficient. Neither is the intention, the

\* Appeal from Original Decree No. 20 of 1915, against the decision of Mr. Justice Chaudhuri, sitting on the Original Side, dated the 4th December 1914.

*animo revocandi*, sufficient, unless some act of obliteration or destruction is done. What acts of tearing, burning, cancelling or obliterating are sufficient to constitute a total or partial revocation, must depend, to a considerable extent, upon the circumstances of each case.

Appeal by the Applicant for probate.

The applicant was the sister's daughter's husband of the testator and asked for grant on the basis that he was appointed executor under a Will, dated the 7th April, 1903. The testator died on the 17th October, 1913. The opposite party alleged that the Will was revoked by the testator on the 29th August, 1913. The application was rejected by the following judgment :

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1914.

December, 14.

**Chaudhuri, J.**—This is an application for probate. The applicant Johur Lall Dey is the sister's daughter's husband of the testator and ask for the grant as the Executor of his Will, dated the 7th April, 1903. The Testator died on the 17th October, 1913. The application is opposed by the testator's son, Dhirendra Nath Dey. There is no contest that the Will of the 7th April, 1903 was duly made. The defendant, however, alleges that it was revoked by the testator on the 29th August, 1913. I held that the onus of establishing the revocation was upon the defendant. The matter has now been heard and evidence has been given on both sides. It appears that the firm of Bonerjee & Bonerjee were for a considerable number of years attorneys for the testator. Originally the firm consisted of Jotindra Nath Bonerjee and his father now dead. Jotindra is the surviving number of that firm, and has been examined on behalf of the defendant. It appears that the Will after it was made remained in the custody of that firm at the instance of the testator. Johur Lall says he made it over to them at the testator's desire. It appears that Fakir Chand Dey fell ill in or about August, 1913 when he went to Karmatar for a change ; he returned to Calcutta and died on the 17th October, 1913. The evidence of Jotindra Nath Bonerjee shortly is this :—that he was informed of the return of the testator from Karmatar by Johur Lall Dey. Johur told him that the testator had expressed a desire to revoke his Will and had asked that the Will should be taken to him. Jotindra thereupon went to the house of the testator on the 29th August, 1913 with the Will. There were present in the room the testator, his son Dhirendra Nath Dey, and one Nibaran Chandra Pal, a partner of the testator ; that on a sign made by the testator, which he understood to mean that nothing was to be done until Nibaran left, Nibaran was asked by the attorney to leave the room. Nibaran then left and the Will was made over to the testator who asked the attorney what was to

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*Chaudhuri, J.*

be done in order to revoke the Will. The attorney said that the testator should write on the Will the word "cancelled," strike out his signature, sign the cancellation and tear the Will partially. The testator carried out these directions, and then made over the document to the attorney. When the attorney was going out of the house, he met Nibaran, and on being asked by Nibaran as to whether the testator had been making a Will, the attorney said "No", he had cancelled a previous Will. Nibaran expressed a desire to see it, and the attorney made it over to him to see ; and after he had seen it he took it back and kept it with him until it was produced under an order of this Court on the 18th February, 1914. This evidence is supported by Dhirendra Nath Dey and Nibaran Chandra Pal. The attorney says that shortly after the revocation of the Will thus made, he met Johur. Johur said that he knew about the revocation and asked the attorney to go to the testator who, he said, was desirous of making a new Will. The attorney thereupon went, but the testator said he would think over the matter, and there the matter ended. The testator had a mother named Golapmoni. Under the Will which was revoked she was to have benefited to a certain extent. Johur Lall was the residuary legatee and Dhiren came in for a small benefit. It will be remembered that this Will had been executed in 1903. There is evidence, which I accept, that the testator had since then fallen out with his mother and that the mother had instituted a suit against him. We have two affidavits by Johur Lall to the effect that the testator and his mother Golapmoni were on very hostile terms up to the 4th August, 1913 ; "violently hostile" is the expression used by Johur Lall. It appears also that the summons in Golapmoni's suit was served on the testator on the 29th August, 1913. The attorney says that endeavour were made thereafter to settle that suit amicably and that he took part in the settlement, but at the time that it was being settled, which was in September 1913, he noticed that the testator did not speak directly to his mother but that the conversation between them took place through third parties. Johur was present at this settlement and took part in it. Johur's case however, is that Golapmoni and the testator again became friendly from the date of the return of the testator from Karmatar, namely, a few days before the 29th August, 1913. This statement of Johur Lall I entirely disbelieve. The son of the testator went with him to Karmatar. He stayed there and attended on him during his last illness, and it appears that the father and son were on affectionate terms in August, 1913. The circumstances at that time were such

that the testator seems to me to have made up his mind to revoke the Will of 1903, which was described by Johur according to one of the witnesses in this case, to whose evidence I shall have to refer later, as "an inequitable Will." The testator apparently did not intend at this time to benefit his mother at all. I am satisfied from the evidence that Johur also was at this time desirous that there should be a new Will. Jotindra Nath Bonerjee says that Johur asked him after the revocation to prepare a draft deed of gift in his favour; that thereupon Jotin prepared a draft and took it to the testator who did not execute it. Johur denied he had given any such instructions and charged that the draft produced was a false document, prepared for this case and that the attorney's statements were altogether untrue. Jotindra Nath Bonerjee is a member of an old established firm of attorneys of this Court. He gave his evidence fairly. I see no reason to doubt his evidence and consider Johur's charge against him as baseless. Why Jotindra should support Dharendra against Johur, I do not see. Dharendra is no longer his client. I believe the statements of Jotindra as to what took place on the 29th August, when he says the Will was revoked. I hold that the Will was cancelled and torn by the testator with the intention of revoking it, and that he signed the cancellation. The revocation is, however, attacked on various grounds, principally that no material portion of the Will has been torn, and that as it is torn to the extent of a few inches only along its width, the tearing cannot be taken to amount to revocation. I am asked to hold that the "tearing" referred to in section 57 of the Succession Act must be equivalent to destruction. Several English cases were cited, and a passage in Brown's Probate Practice, (Edition 1881) p. 93, where some of these cases are summarized, has been strongly relied upon. According to the learned author the result of the cases is (1), that some material portions or portion of the Will must be torn or destroyed, such as the signatures of the testator and the attesting witnesses, (2), that the act or acts must be done with the intention of revoking, (3), that the testator must have completed the acts or act he intended to do for the purpose of revocation. In this case the document is torn in the middle to the extent of 3 or 4 inches. It is a clear tear. It has not the appearance of an accidental tear, and, according to the evidence, it was deliberately torn "partially" according to the attorney's instruction. The signatures have not been torn, but if the evidence is accepted—and I accept it as true—the tear was made with the intention of revoking the Will. I am asked to hold that inasmuch as no material portion seems to have been torn, there has

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been no revocation in law. I do not think the cases show that it is necessary that the documents should be torn up so as to amount to total destruction. This question came up before Sir C. Cresswell in *Elms v. Elms* (1). That was a case in which the testator intended to revoke his Will. He began tearing it with the intention of tearing it up. He very nearly completely tore it up, but owing to certain exclamations made by persons in the room as to the danger of tearing it up before making another Will, he stopped short and did not completely tear it up as he had originally intended. He put the torn document by and nothing further was done by him. On the facts it was held that the intention in that case was originally to tear it up completely, but that the testator did not give effect to his intention and that the tearing could not, therefore, be taken as a completed act. The testator had given up the idea of tearing it up and had put by the document. The learned Judge held that in order to make the revocation effectual the act should have been completed as originally intended. The learned Judge's comment is, "it may be said that he tore the Will with the intention of revoking it; for no doubt he had that intention when he began to tear, and as soon as he had torn a quarter of an inch, he had torn it with the intention of revoking; he did not intend to revoke it by that tearing only, but intended to tear further." I think that in this case it is quite clear that the testator intended to revoke the Will. He never intended to tear it up altogether. His intention was only to tear it partially, as suggested by his attorney. He completely carried out the instruction of his attorney. He was not told to do anything more and did not intend to do anything more. It was argued that the writing of the word "cancelled" and his signature thereto, and the penning through of his original signature, did not amount to revocation, and the case of *Stephens v. Taprell* in (2), was relied upon as also the judgment of Lord Denman, C. J., in *Doe on the Demise of Gratex v. Hoffman* (3). Taking the facts of this case, I hold that there has been an effective revocation by "tearing" within the meaning of the section.

[His Lordship then discussed the evidence in details and passed the following order.]

I hold that the Will was duly cancelled and revoked and that the applicant is not entitled to probate. It has been urged on behalf of the applicant that the costs of these proceedings should come out of the estate. I am unable to make such an order in-

(1) (1858) 1 Sw. & Tr. 155.

(2) (1840) 2 Curteis Report, 458.

(3) (1837) 6 Ad. & El. 206.

as-much as I hold that Johur knew of the revocation. It is not a case in which he has been obliged to come to Court to have the cancellation decided by the Court, having regard to the appearance of the document. If he had no information with regard to the matter, or if he had not sufficiently investigated the matter, or that upon investigation, sufficient information was not given to him, the thing might have been different; but he has deliberately put forward a Will which I believe he knew to have been revoked. He has in addition not hesitated to make charges of forgery. The reason for his inspection on the 11th December seems to have been that he knew that Dharendra was moving in the matter, that letters had been written on Dharendra's behalf to Satya Charan Srimany in November 1913, and Johur had himself received a letter from Dharendra demanding documents and other property back and accounts, see letter of the 2nd December, 1913 followed by this letter of the 12th December, 1913. He thereafter thought of making this application. I dismiss it with costs against Johur Lal on Scale No. II. On copies being kept, the books may be returned.

Against this decision, the petitioner appealed.

*Messrs. N. Sircar and S. N. Ghose* for the Appellant.

*Messrs. Jackson, Langford James and P. N. Dutt* for the Respondent.

C. A. V.

The judgments of the Court were as follows :—

**Sanderson, C. J.**—In this case the question arises in connection with the Will of a man called Fakir Chand De. The appellant is the sister's daughter's husband, and the respondent is the son of the testator.

The Will was made on the 7th of April 1903, and under it the appellant took a substantial interest. The Will is alleged to have been revoked on the 29th of August 1913. The testator, apparently, was taken ill in August 1913; he went to a place called Karmatar and returned from there sometime in August, and, according to the endorsement on the Will, he cancelled his Will on the 29th of August 1913.

The appellant puts his case in two ways: He says first of all that the whole of the cancellation was not genuine. He alleges that the handwriting on the Will which purports to be the cancellation is not in the handwriting of the testator, that the signature which purports to be the signature of the testator in respect of the cancellation is not

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the signature of the testator, and he goes on to say that the date was originally the 9th of August but was altered, at some time or other, to the 29th of August. He also says, though his learned Counsel did not seem to lay so much stress on this part of his case that although the words of the cancellation may have been written upon the Will by the testator himself and although the signature may have been his, still there was no tearing at the time the word "cancelled" was written, and that the tearing was done by somebody after the testator's death.

There is an alternative point which the appellant takes : He further says that even if the cancellation in every sense of the word was a genuine cancellation, it is not effective in law, because the cancellation was not attested by two witnesses in accordance with the provisions of the Act, and secondly that the tearing is not a sufficient tearing in compliance with the provisions of the Act,

On the other hand, on behalf of the respondent it was contended in the Court of first instance that the cancellation was absolutely genuine, that the testator consulted his solicitors Messrs. Bonnerjee and Bonnerjee of whom Jotindra Bonnerjee was the surviving partner, that Mr. Bonnerjee was summoned to the house of the testator, that he took the Will with him to the testator's room, that after requesting the testator's partner to leave the room, and in the presence of the testator's son, the testator wrote the word which appears on the Will, "cancelled," and signed his name and dated it the 29th of August.

I think it would be quite unnecessary and would be uselessly taking up the time of the Court, if I were to go into the facts of the case in great detail. The main facts have been very carefully set out by the learned Judge of the Court of first instance who tried the case : They have been very clearly stated by the learned Counsel who appeared before us, and in addition to that we have a statement of the facts relied upon by him handed up to the Bench this morning. I have stated the contention on the one side and on the other. In my opinion this was a case in which the main question which was of course a very serious question—as to whether this cancellation was a genuine cancellation or not is a question of fact and, which to a very large extent depended upon the evidence of witnesses and the way in which they gave their evidence. It is quite unnecessary for me to emphasize the point that the learned Judge who has to decide a question of fact has the opportunity and advantage of seeing the witnesses in the witness-box, of hearing them give their evidence and of observing their demeanour when they are giving

their evidence and has thus enormous advantage over judges who are sitting on the Court of appeal, and for whose guidance there are only the written memoranda of the evidence and the arguments of the learned Counsel, who no doubt place their case before the Court, as in this case, to the best of their ability : and, where the point is really a question of fact, speaking for myself only, I should be very reluctant to interfere with the judgment of the learned Judge of the Court of first instance, who has had that opportunity of seeing the witnesses on both sides and has evidently tried the case with very great care and had given the matter his earnest consideration. In my judgment, the opinion of the learned Judge so formed after seeing the witnesses and hearing their evidence upon a question of fact ought not to be differed from by this Court except upon very clear ground indeed.

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Now, in spite of the very able argument of the two learned counsel for the appellant to which I have listened with great attention, they have not satisfied me that Mr. Justice Chaudhuri upon this question of fact has gone wrong : and, that being so, it is really not necessary for me to say more. I quite agree with them that there are matters which might legitimately give rise to suspicion : I may mention, as an instance, the fact that inspection was not given as was asked for ; that the reasons for refusing that inspection might not appear to be good reasons ; that an unjustifiable charge of Rs. 200 was asked for as preliminary to giving such inspection. I am only mentioning these facts to show that I have not forgotten but have considered them. Then there is the fact that the day-book was not at first produced and was not actually seen until April 1914. There is also the fact that there is a blot upon the Will which it is urged by the learned Counsel for the appellant is a blot of the figure 2 only and therefore goes to show that the figure 2 was added afterwards and was not put upon the paper at the same time as the figure 9. I have considered that. Judging through my own eyes, I am not at all certain that the blot is not only of the figure 2 but of part of the figure 9 as well ; and, I am not at all certain that there may not have been some more ink used upon the first part of the writing which deals with the date and that part may not have dried so soon as the other : And, while I am referring to this I may mention that it seems to be quite possible that any body looking at the figure hurriedly might say this is 9th August, but looking at it more closely, it is not 9th but 29th. The two figures are put so closely together that on casual or short inspection they may appear to be one. I am only mentioning these matters to show that I have not forgot-

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ten them, but I do not intend to go into any detail. I may justify my judgment upon this ground that the question is a question of fact, and Mr. Justice Chaudhuri had the evidence which, in my opinion, if believed justified him in coming to the conclusion to which he did. I have considered the whole of the evidence, and the learned Counsel for the appellant has not satisfied me that the opinion of the learned Judge is wrong. This is quite sufficient to say with regard to the first point.

With regard to the second point, it raises a very interesting question of law and it is this : Assuming that the cancellation upon the Will was a genuine cancellation, still it is not such as complies with the provisions of section 57 of the Indian Succession Act.

Now, that section no doubt requires two things—first of all, an intention to revoke, and secondly the cancellation to be executed in the same way as a Will ought to be executed, or there must be a burning, tearing or otherwise destroying the Will. The section says, “*No unprivileged Will or codicil nor any part thereof shall be revoked otherwise than by marriage or by another Will or codicil or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged Will is hereinbefore required to be executed.*” I may pause here for one moment to say that it is admitted in this case that the alleged revocation or cancellation was not executed in the manner in which a Will ought to be executed. Then the section goes on to say “or by the burning, tearing or otherwise destroying the same by the testator.....*with the intention of revoking the same.*” Therefore, we have got to consider whether there was first of all the burning, tearing or otherwise destroying, and *secondly* if there was such burning, tearing or otherwise destroying, whether that was done with the intention of revoking the Will. Now, the only thing that is alleged here is *tearing*. Therefore, all we have got to consider is whether such *tearing* comes within this section, and *secondly* whether this was done with the intention of revoking the Will.

Now, it seems to me that if Mr. Justice Chaudhuri's judgment be upheld upon the first point as in my opinion it must be—namely, that the cancellation was genuine, then it is obvious that the testator had the intention of revoking his will. Therefore, the only question which is left to be considered is whether there was a tearing of the Will in such a way as to comply with the provisions of the section. In my opinion there was. It is to be noted in this case that according to the evidence which Mr. Justice Chaudhuri has accepted, the testator did all that he was told to do. The learned

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Judge says: "He never intended to tear it up altogether. His intention was only to tear it partially as suggested by his attorney. He completely carried out the instructions of his attorney. He was not told to do anything more and did not intend to do anything more." I draw attention to that, because that seems to me to entirely distinguish this case from the case of *Elms v. Elms* (1) to which the learned Judge of the Court of first instance drew attention, and the report of which Mr. Justice Mookerjee has handed to me this morning. In that case there was a tearing of the Will, a tearing across all the pages of the Will, but no one of them was completely torn through, and it came about in this way. The testator when he began to tear them intended to revoke the will. Before he completely tore them he was prevented by the exclamations of those who were in the room from completing the tearing by tearing it right through, and therefore he never actually completed that which he set out to do. In this case, if we accept the finding of fact which I have said we ought to do that what the testator was told by his attorney to do was to tear the will partially, and Mr. Justice Chaudhuri has found on the evidence that he carried out those instructions, the testator did complete that which he set out to do. It is pretty clear to my mind upon the authority of the learned Judge who gave judgment in that case, and I adopt what he says, that the Legislature does not mean that the testator must rend the Will into more pieces than it originally consisted of. The learned Judge adds "and, therefore, although no one sheet of paper was completely divided, I think the tearing might be sufficient to revoke if done with that intention. But in order to make it effectual he must have intended to revoke by so tearing it; by which I mean that he must have intended that which he actually did of itself to have that effect without more." Mr. Justice Chaudhuri has found quite clearly on the evidence and I do not intend to interfere with that finding—that when the testator did tear the will in the way he did, he did intend to revoke it by so tearing and he did not intend to do any more tearing. That being so, I think the tearing comes sufficiently within the meaning of the section. I have to refer to one other case which the learned counsel has cited this morning in the course of his argument, *Bibb Dem Mole v. Thomas* (2). In that case the testator being in bed one day near the fire ordered a person to fetch his will; the will was fetched, and then he opened it and gave it a rip with his hands and then rumbled

(1) (1858) 1 Sw. &amp; Tr. 155.

(2) (1775) 2 W. Bl. 1043.

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it together and threw it on the fire, but it fell off and was not burnt. The person who was in the room picked it up and kept it without his notice. It was left to the jury to consider whether that was sufficient revocation and the jury found that it was and that the testator intended to revoke it ; and when it went to the Court, Chief Justice Grey observed 'that this case fell within two of the specific acts described by the statute ; it was both a burning and tearing,' although as a matter of fact in that case the Will had got only a rip with the hands and had fallen off the fire being slightly burnt without being seriously injured. I think upon the authority of those two cases, it is clear that a tearing which is such a tearing as to evidence a man's intention to revoke a Will, and is all the tearing that he intends to do and then stops as he has done in this case, a tearing which he was directed to do on the advice of his attorney, and this added to the fact that he writes the word "cancelled" and signs his name, would, in my opinion, be a sufficient compliance with the provisions of the section : and, on those grounds I think Mr. Justice Chaudhuri's judgment was right upon the second point.

For these reasons I think Mr. Justice Chaudhuri's judgment and decree must be upheld and this appeal must be dismissed with costs.

**Woodroffe, J.**—I am of opinion that the facts of this case establish that what was alleged to be done constituted an effective revocation in law. The rest of the question is one of simple fact. The appellant has shown no ground for disturbing the judgment of the Court of first instance accuracy of which in the main depends on the value which the learned Judge attached to the witnesses whom he had an opportunity which we have not of seeing. I agree, therefore, that the appeal should be dismissed.

**Mookerjee, J.**—I agree that Mr. Justice Chaudhuri arrived at the correct conclusion upon each of the two fundamental points in the case, namely, first, was there a genuine act of cancellation by the testator ; and, secondly, was the act operative as a valid cancellation in law.

The answer to the first of these questions depends upon the evidence. Notwithstanding the careful criticisms of the counsels for the appellants, I can see no good ground to defer from Mr. Justice Chaudhuri in his estimate of the evidence on the record, which conclusively establishes that the endorsement of cancellation was made by the testator. There is also satisfactory evidence to show that the Will was torn by the testator. There is an entry to this effect in the day-book of the attorney, and I see no reason to doubt the genuine-

ness of that entry. We have consequently the two facts that the Will was torn by the testator and that he made an endorsement to show that he intended to cancel the Will thereby.

The second question is, whether the act of tearing was operative as a valid cancellation in law. The answer depends upon the true construction of section 57 of the Indian Succession Act. That section, as I read it, lays down that revocation consists of two elements; the intention of the testator, and some outward act or symbol of destruction. A defacement, obliteration or destruction without the *animo revocandi* is not sufficient. Neither is the intention, the *animo revocandi*, sufficient, unless some act of obliteration or destruction is done. What acts of tearing, burning, cancelling or obliterating are sufficient to constitute, a total or partial revocation, must depend, to a considerable extent, upon the circumstances of each case. Reference, may, in this connection, be made to a passage in the judgment in the case of *Price v. Powell* (1): "If the document should be entirely burnt up, entirely obliterated or torn into scraps or covered with cross lines, there would be no doubt as to the intent of the testator. But it is not necessary to go to that extent in any of the modes, in order to answer the requirements of the statute, and, the slightest degree of either mode is effectual as to such revocation, provided it appears that the act was done with the intent to have it constitute a revocation." The conclusion, consequently, follows that by tearing is not meant a literal tearing to pieces; the slightest act of tearing with intent to revoke the whole will thereby is sufficient for the purpose. This view is in agreement with the principle deducible from *Bibb v. Thomas* (2); *Clarke v. Scripps* (3); *Elms v. Elms* (4); *Price v. Powell* (1); and *Williams v. Tyley* (5). On these grounds, I agree with the learned Chief Justice that the judgment of Mr. Justice Chaudhuri must be affirmed.

*Babu Satyendra Chandra Mitter* :—Attorney for the Appellant.

*Bonnerjee & Bonnerjee* :—Attorney for the Respondent.

A. T. M.

*Appeal dismissed.*

(1) (1858) 3 H. & N. 341 (350); 17 R. R. 719.

(2) (1775) 2 W. Blackstone 1043. (3) (1852) 2 Robertson Ecc. 563.

(4) (1858) 1 Sw. & Tr. 155.

(5) (1858) Johnson 530; 123 R. R. 223.

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*Before Sir Lamelot Sanderson, Knight, K. C., Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.*

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KUMAR KRISHNA DUTT.\*

*Lien—Attorney and client—Attorney discharging himself—Retention of papers.*

In the absence of proof of a special agreement between the solicitor and the client as to the mode of payment of the fees or the conduct of the proceedings, the refusal of the attorney to carry on the proceedings till he was paid his expenses, operates as a discharge by himself.

An attorney is entitled, at least, to his lien, and if this is secured to him, he cannot claim to embarrass the proceedings by retention of the papers.

*Per Sanderson, C. J.*—An attorney, if he discharges himself, cannot claim to retain the papers when they are wanted by his former client for the purpose of continuing the litigation. The most he would be entitled to, would be to have his lien protected by an undertaking given by the new attorney.

*Per Mookerjee, J.*—In the event of a change of solicitors in the course of an action, the former solicitor's lien is not taken away, but his rights in respect of his lien are modified according as his discharge is by himself or by his client.

A solicitor cannot be treated as finally discharged till the leave of the Court has been obtained. *Atul v. Lakshman* (1) followed.

Appeal by the Petitioners.

Application praying that the attorney be discharged and he be ordered to make over all the papers in a certain suit to another attorney. The facts of the case are as follows:—

The defendants Prabhulal and Nannumull, father and son respectively, who are appellants in this case, employed Babu Kumar Krishna Dutt as their attorney in suit No. 1171 of 1913 on the Original Side of the High Court at Calcutta. The suit was decreed and the matter was referred to the Official Referee for taking accounts. When the reference was taken up by the Official Referee, Nannumull had to leave Calcutta owing to the illness of his father Prabhulal and the matter was decided *ex parte*. On his return Nannumull instructed his attorney Babu Kumar Krishna Dutt to apply for restoration of the said reference which he did on receipt of Rs. 400 as his costs. The Official Referee ordered the restoration subject to the payment of Rs. 800 to the plaintiff for costs. Thereupon Nannumull instructed the said attorney to move against this order praying that the costs may be limited to a much less amount and

\* Appeal from Original Order No. 65 of 1915, against the order of Mr. Justice Chaudhuri, sitting on the Original Side of High Court, dated the 22nd July, 1915.

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the payment of costs be not made a condition precedent to restoration. Babu Kumar Krishna Dutt declined to make any such application without further sums being paid to him on account of his costs. Upon this Nannumull being dissatisfied wrote to Babu Kumar Krishna Dutt a letter dated the 29th of June, 1915 requesting him to hand over the papers, in case the said attorney refused to work further on his behalf, so that he might engage another attorney or proceed with the suit in person. He also informed that he would present a petition before the Judge in person unless he received a reply in the course of the day.

On the 1st of July, 1915 Nannumull gave a notice that he would make an application in person before Mr. Justice Chaudhuri that his attorney Babu Kumar Krishna Dutt might be discharged and that he be ordered to make over all the papers in the case.

On the 2nd of July, 1915 Babu Kumar Krishna Dutt sent a reply to the letter of the 29th ultimo contradicting the statements made by Nannumull, but all the same having regard to the attitude of his client he thought it would be pleasant for all to allow him to change his attorney provided his costs were somehow secured.

Both the defendants and the attorney filed affidavits and counter-affidavits in support of and against the allegations made by the parties against each other.

The application was made by Nannumull in person on the 22nd of July, 1915 and the order of Mr. Justice Chaudhuri was as follows :

It is ordered that the said Babu Kumar Krishna Dutt be discharged from further acting as the attorney for the defendants in this suit and that the defendants be at liberty to appoint another attorney to act for them in the reference, before the Official Referee of this Court : And it is further ordered that the said Babu Kumar Krishna Dutt without prejudice to his lien for costs due to him in this suit do produce before the said Official Referee such papers and documents as may be in his possession when required by the said defendants upon their paying beforehand to the said Babu Kumar Krishna Dutt his costs of and charges for such attendance : And it is further ordered that the said defendants do pay to the said Babu Kumar Krishna Dutt his costs of and incidental to this application and the costs due to him in this suit to be taxed by the Taxing Officer of this Court as between attorney and client on Scale No. 2.

Against this order, the petitioners appealed.

*Messrs. Jackson and Bose* for the Appellant.

*Mr. N. Sarkar* for the Respondent.

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**Sanderson, C. J.**—In this case the application was by one.

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Nannumull that his attorney should be discharged and that the attorney should be ordered to make over all the papers in a certain suit, No. 1171 of 1913, to another attorney : and, the order which was made by the learned Judge—one of the defendants Nannumull appearing in person, and the attorney consenting—was “that the attorney be discharged from further acting as the attorney for both the defendants, Prabhulal and Nannumull in this suit and that the defendants be at liberty to appoint another attorney to act for them in the reference before the Official Referee of this Court,” and, it was further ordered “that the attorney Babu Kumar Krishna Dutt without prejudice to his lien for costs due to him in this suit do produce before the said Official Referee such papers and documents as may be in his possession when required by the said defendants upon their paying beforehand to the said Babu Kumar Krishna Dutt his costs of and charges for such attendance.”

Now, just to dispose of one point at once : it was argued that inasmuch as the attorney had been acting on behalf of both the defendants, the application ought to have been made by both of them, and that the attorney could not be discharged unless the application were made by both of them.

As a matter of fact, the order is to the effect that the attorney shall be discharged from acting for both the defendants. Therefore the learned Judge must have understood, when he made the order, that the application was made to that effect. The defendants are father and son, and the son has sworn an affidavit, that he has had control of the litigation not only on behalf of himself but also on behalf of his father, and this application ~~was~~ made on behalf of his father as well as for himself : and, I do not think there is any substance in that objection : But the point of substance is whether under the circumstances of this case, the learned Judge has made a proper order when the effect of his order was that the papers should remain with the first attorney and that they should be produced for the purpose of being used in the suit by him and that the defendants should be called upon to pay his costs of such production : In my opinion that is not a proper order. First of all, it appears that the attorney had been acting on behalf of the client in the ordinary way without any qualification at all. Then something happened, and there was a dispute between the parties, the defendant saying that the attorney had refused to go on acting for the client unless money was provided by the client. As against that the attorney has sworn that he never did anything of the kind, and I am not going to arrive at or trying to arrive at any decision

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as to which of those two gentlemen is correct in his account of the interview. But there is a letter of the 2nd of July, 1915, which is referred to at page 21 of the paper-book, and that appears to me to be an admission by the attorney that he had refused to go on acting for the client unless his out-of-pocket expenses were paid. Now, if the relationship between the attorney and the client was the ordinary relationship between an attorney and his client, I do not think it would be disputed that that would amount to a discharge of the attorney by himself, and if it were a discharge of the attorney by himself then he could not claim to retain the papers when they were wanted by his former client, for the purpose of continuing the litigation. The most he would be entitled to would be to have his lien protected by an undertaking given by the new attorney.

But it was said by the learned counsel who appeared for the attorney that as a matter of fact the client had himself discharged the attorney, and he pointed particularly to a letter written in November 1914, which appears at page 41 of the paper-book, the effect of which was—it was written by another firm of attorney—to give the first attorney notice that Messrs. Prabhulal and Nannumull desired to change their attorney and asking for a bill of costs in order that it might be delivered to the Taxing Office and he might be paid and the change effected as soon as possible, and he argued that that amounted to a discharge by the client of his attorney. I do not think that that can be so, having regard, at all events, to what happened afterwards: If we look at the document which is referred to at pages 26 to 40 of the paper-book it is clear that the attorney did continue to act as attorney right way down to the 13th of July 1915, and in those circumstances, I do not think it is possible for him now to come forward and say that he was in fact discharged by the client.

But he made a further point: He said that up to a time it is quite true that the attorney was acting in the ordinary way for the client, but there came a time when the attorney would not act without payment to him of his out-of-pocket costs. Therefore a fresh arrangement was arrived at that the attorney would only be called upon to act, if and when the money were provided by the client, and, that money was not provided by the client and consequently he was discharged by the client.

Now, the case to which Mr. Jackson drew our attention this morning, namely, *Bluck v. Lovering & Co.* (1) seems to me to be exactly in point: If I put the present case as highly as it can be put

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in favour of the attorney, and assume in his favour—although I do not think it is proved—that after a certain time—probably in June, 1915, but the date is not material—the attorney was only bound to act if and when the client provided him with money for his out-of-pocket expenses, even then the order which was made by the learned Judge was not a proper order for this reason: In the case of *Bluck v. Lovering & Co.*, (1) it was part of the original retainer of the solicitor that he should only be bound to act as long as the money should be supplied from time to time for the necessary outgoings. Then there came a time when the money for the necessary outgoings was not supplied by the client. Thereupon the solicitor said that he was not bound to act and that he was not bound to hand over the papers. But the learned Judges, Chief Justice Lord Coleridge and Mr. Justice Manisty held that although that was a legitimate arrangement to make between the solicitor and the client, still the solicitor could not prevent or inconvenience the client in his prosecution of the litigation by refusing to hand over the papers, and the learned Chief Justice said this: “The solicitor has a right to say that he will not go on with an action, and he has a lien; but he has no further right to embarrass a client in an action which he has himself refused to prosecute. Upon the authorities, and Mr. Lush-Wilson’s admission, this would not be disputed in an ordinary case. But it is said that an express contract makes all the difference in the rights of the solicitor. I can see no principle of law upon which that can be founded. The contract, whether it is one by inference or express, is no more than a contract. If a case could have been found in which, on grounds of expediency, the Court had held that express words made this difference, it would have been arguable. But no such case has been produced; and, on the contrary, in *Clover v. Adams* (2), where solicitors refused to go on, the Court consisting of Grove and Lindley JJ. expressly held that the client was entitled to have his papers delivered to him. It seems to me, that the cases cited are authorities proving that the papers cannot be retained pending the conclusion of a suit. “The attorney ought to have protection, but not so as to embarrass the proceedings.” Then he goes on to say that the order of Pollock B. was wrong. It seems to me, as I have said, that this case is directly in point. Putting the case as high as can be in favour of the attorney here, that he was not bound to act on behalf of his client unless the necessary sums were provided, he was not entitled to hold the papers so as to embarrass the client: and, both the learned Judges went on to say that in such a case as that which

(1) (1886) 35 W. R. 232.

(2) (1881) 6 Q. B. D. 622.

they were considering the proper order to make was that made in the case of *Robins v. Goldingham* (1). In that case the headnote is this: "Where a solicitor applied to his client for funds to carry on a suit, and, upon the client not furnishing any, declined to continue to conduct the litigation, and the client appointed fresh solicitors: *Held*, that this was a discharge by the solicitor, and that he might be called upon to deliver to the new solicitors the papers relating to the matters in question in the suit, on their undertaking to hold them without prejudice to his lien and to return them undefaced within twelve days after the conclusion of the suit, and to allow the former solicitor access to them for the purpose of carrying on an action for his costs."

Therefore, when the learned Judge made an order, as he did in the present case, the attorney consenting that the attorney should be entitled to retain the papers and that the client should only have a limited access and they should be produced upon paying to the attorney the costs of production I think it was an order which ought not to have been made.

I quite appreciate the difficulty in which Mr. Justice Chaudhuri was placed by the fact that the defendant appeared in person, and in all probability he had not the real position between the parties present to his mind when he made this order. We have not had any detailed judgment, and it may be that we are not in possession of what was passing in the learned Judge's mind. On the contrary, here, we have had the advantage of hearing learned counsel on both sides and had the matter fully argued and the material points prominently brought to our notice—an advantage which Mr. Justice Chaudhuri had not—in considering this point.

Therefore, I think this appeal must be allowed, and the proper order will be in accordance with the judgment in the case of *Robins v. Goldingham* (1) so far as it is material.

The respondent will pay the costs of this appeal. As the defendant in the Court below appeared in person, we make no order as to the costs in that Court.

**Woodroffe, J.**—I agree.

**Mookerjee, J.**—I agree that the order made by Mr. Justice Chaudhuri, which is of an exceptional character, cannot possibly be supported. It cannot be disputed that in the event of a change of solicitors in the course of an action, the former solicitor's lien

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is not taken away, but his rights in respect of his lien are modified according as his discharge is by himself or by his client : *Re Rapid Road Transit Co.* (1) If he is discharged by the client otherwise than for misconduct, he cannot, so long as his costs are unpaid be compelled to produce or hand over the papers ; if on the other hand, he discharges himself, he may be ordered to hand over the papers to the new solicitor, on the latter undertaking to hold them without prejudice to his lien, to return them in tact after the action is over, and to allow the former solicitor access to them in the meantime : *Re Faithful* (2) ; *Robins v. Goldingham* (3). Consequently two questions require consideration, namely, first, did the client in this case discharge the attorney, and, secondly, if he did not, and the attorney discharged himself, is the latter entitled to the order made in his favour.

As regards the first question, reference has been made to the letter of the 19th November 1914 to support the view that the client had discharged the solicitor. There is plainly no force in this contention. The letter in effect did not discharge the solicitor ; and the subsequent conduct of the attorney also shows that he did not treat himself as discharged. Besides, as was pointed out by Mr. Justice Harington in the case of *Atul Chunder Ghose v. Lakshman Chunder Sen* (4) under the Indian law [Order 3 R. 4, Civil Procedure Code, read with section 2 (15)] a solicitor could not be treated as finally discharged till the leave of the Court had been obtained.

As regards the second question, we have to consider the letter of the 2nd July, 1915, which, I am inclined to hold, operated as a discharge of the attorney by himself. I need not consider what the true position might have been, if foundation had been laid in the course of the proceedings for a possible theory that there was a special agreement between the solicitor and the client as to the mode of payment of the fees or the conduct of the proceedings ; it is in any event clear that in the absence of proof of such agreement, the refusal of the attorney to carry on the proceedings till he was paid his expenses, operated as a discharge by himself : *Robins v. Goldingham* (3) ; *Clover v. Adams* (5) ; *Wilson v. Emmett* (6) ; *Heslop v. Metcalfe* (7) ; *In re A Solicitor* (8) ; *Basanta v. Kusum* (9), *Atul v.*

(1) (1909) 1 Ch. 96.

(3) (1871) L. R. 13 Eq. 440.

(5) (1831) 6 Q. B. D. 622.

(7) (1837) 3 Myl. &amp; Cr. 183.

(2) (1863) L. R. 6 Eq. 325.

(4) (1909) L. R. 36 Calc. 609.

(6) (1854) 19 Beav. 233.

(8) (1870) 4 B. L. R. 29 P. C.

(9) (1900) 4 C. W. N. 767.

*Soshi* (1), *Maheshpur Coal Co. v. Jatindra Nath Gupta* (2). But even if the letter of the 2nd July, 1915, be not treated as a discharge of the attorney by himself, I think the attorney could not justly obtain the order made in his favour, as is clear from the decision in *Bluck v. Lovering and Co.* (3). He is entitled, at best, to his lien, and if this is secured to him, he cannot claim to embarrass the proceedings by retention of the papers [See also *Griffiths v. Griffiths* (4); *Hutchinson v. Norwood* (5)]. I consequently hold that the appeal must be allowed, the order of Mr. Justice Chaudhuri discharged, and an order made in the terms proposed by the learned Chief Justice.

*Messrs. S. D. Dutt & Ghose*—Attorneys for the Appellants.

A. T. M., S. C. R. C.

*Appeal allowed.*

(1) (1901) I. L. R. 29 Calc. 63; 6 C. W. N. 215.

(2) (1912) I. L. R. 40 Calc. 386.

(3) (1886) 35 W. R. (Eng.) 232.

(4) (1843) 2 Hare 587.

(5) (1886) 54 L. T. 842.

## APPELLATE CRIMINAL.

*Before Mr. Justice Chapman and Mr. Justice Roe.*

SAMANTA DHUPI AND OTHERS

v.

KING EMPEROR.\*

*Indian Penal Code (Act XLV of 1860), Secs. 201, 302—Murder, causing disappearance of evidence of—Principal, if can be convicted as an accessory after fact—Alternative indictment, propriety of.*

Section 201 of the Indian Penal Code is an attempt to define the position known in England as that of an accessory after the fact. It is settled law that a principal cannot be convicted as an accessory after the fact.

*Per Roe, J.*—Where it is impossible to say definitely, however strongly it might be suspected, that an accused was guilty of murder, mere suspicion is no bar to a conviction under section 201 of the Indian Penal Code.

*Queen Empress v. Limbya* (1) relied on.

The accused were committed to the Sessions Court under sections 302 and 201 of the Indian Penal Code; and during the trial the charge under section 201 I. P. C. was first investigated, the charge under section 302 I. P. C. being postponed for future consideration; and they were convicted under section 201 I. P. C.:

\* Criminal Appeal No. 552 of 1915, against the order passed by the Court of Sessions of Noakhali, dated the 11th of May, 1915.

(1) (1895) Unreported Cr. Cas. Bom. H. C., p. 799.

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v.

Kumar Krishna.

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*Held*, that, if the facts found by the Sessions Judge were accepted it was beyond question that they amounted to a chain of circumstantial evidence amply sufficient to justify the conviction of the accused as principals ; and if they were not accepted the accused were on the merits of the case not guilty ; and as such the conviction could not be sustained.

*Per Chapman, J.*—It is unsatisfactory to have an alternative indictment one count charging the accused as principal and the other as accessory after the fact.

*Torap Ali and another v. Queen-Empress* (1) followed.

Appeal under section 410 of the Code of Criminal Procedure.

The three accused Samanta Dhupi, Bhagwan Dhupi and Pyari Dhupi were convicted under section 201 of the Indian Penal Code, and sentenced to seven years', five years' and one year's rigorous imprisonment each respectively by the Sessions Judge of Noakhali. Against the said conviction and sentence they preferred the above appeal to the High Court.

The other material facts will appear sufficiently from the judgment of Roe J.

No one appeared for the accused.

*Babu Atulya Charan Basu* for the Crown.

The following judgments were delivered:—

August, 31.

**Roe, J.**—The facts of this case as set forth in the judgment of the learned Sessions Judge are as follows:—On the 3rd February one Girish Kahar disappeared and was never seen again alive. On the 12th February, a dead body was found in a pond which appears to be an overflow from a tidal river. The body was lying under three feet of mud and on it was a heavy ladder. It was so far decomposed that the medical officer who held the *post mortem* examination was unable to give any cause of death ; but from its clothing it was identified as the body of Girish by his relations. As soon as the body was discovered a first information was lodged before the Police in which it was stated that the undoubted cause of the killing of Girish Kahar was that his cousin was an idiot and that his wife Nundarani was an immoral woman, her chief visitors being Samanta Dhupi and Bhagwan Dhupi, two of the accused now before us, and that Girish was an obstacle to these intrigues. After investigation two other Dhupis, Bharat Dhupi and Pyari Dhupi were arrested by the Police and were brought before the Deputy Magistrate for the recording of statements which for the purpose of the present case it is not necessary to consider. It is sufficient to say that they are not admissible in evidence against the two accused Samanta and Bhagwan. Evidence was placed before the committing Magistrate

to the effect that from the condition of the rice in the stomach of the deceased he must have died three or four hours after his last meal which was taken at 6 p. m. A number of witnesses gave evidence that they saw Samanta and Bhagwan, Pyari and Bharat between 6 and 8 p. m. loitering near the house of Girish and two boatmen saw Samanta the same night at 11 p. m. with two other men at a spot a short distance from the place where the body was found. The men that they saw were muddled to the waist. Other witnesses saw Samanta and Bhagwan about midnight returning to their homes with mud upon their legs. Upon this evidence the four accused Samanta, Bhagwan, Bharat and Pyari were committed to the Sessions Court under sections 302 and 201 I. P. C.

On the case coming on for trial it was at once evident that it would be illegal to try both these offences together. Accordingly the charge under section 201 I. P. C. was first investigated, the charge under section 302 being postponed for future consideration.

The facts as found by the Sessions Judge amount to this, that the medical officer is wrong in his deduction from the digestion of the food in the stomach of the deceased as to the exact hour of his death. That hour would more rightly be fixed at between 7 and 8 p. m. The Sessions Judge finds on the evidence that it is conclusively proved that Bhagwan and Samanta disposed of the body of Girish by sinking it in the pond. He finds that it is conclusively proved that Girish was murdered between 7 and 8 p. m. on the night of the 3rd February. He is satisfied that Samanta and Bhagwan had a sufficient motive for killing him. He finds that they were loitering near the house of Girish at the exact hour of the murder. On these facts he has convicted them under section 201.

Section 201 is an attempt to define the position known in England as that of an accessory after the fact. It is settled law that a principal cannot be convicted as an accessory after the fact. The learned Judge recognizes this. His argument is that the evidence on the record is insufficient to justify him in saying definitely that either Samanta or Bhagwan was actually guilty of the murder and that therefore there is no bar to their trial under section 201. I have considered carefully the opinion of many learned Judges upon this section, particularly the opinion of Jardine C. J. and Ranade J. in the case of *Queen-Empress v. Limbya* (1). I accept with confidence the rule laid down in that case that, where it is impossible to say definitely however strongly it might

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be suspected, that an accused was guilty of murder, mere suspicion is no bar to a conviction under section 201. But I am satisfied that if it be accepted as a proved fact that the accused before the Court disposed of a dead body and if the acceptance of that fact completes the chain of circumstantial evidence which proves beyond doubt that the accused were actual principals present at the murder and taking part in the murder, they cannot be convicted of the minor offences of causing evidence of the murder to disappear even though by an error of the Judge or by a misconception of the proviso by the Public Prosecutor the charge of murder is subsequently withdrawn.

We must take it as a fact conclusively proved that the accused on the night of the murder of Girish disposed of his dead body. We must take it that before any investigation had been made by the Police Samanta and Bhagwan were clothed with a motive for the murder. We must take it as proved beyond dispute that the murder was committed between 7 and 8 P. M. and that between 7 and 8 P. M. Samanta and Bhagwan were seen by numerous witnesses loitering near the house of the deceased. If all these facts are accepted as being conclusively proved it is beyond question that they amount to a chain of circumstantial evidence amply sufficient to justify the conviction of the accused as principals. If we accept the facts found the appellants were certainly principals. If we do not accept the facts found they are on the merits of the case not guilty. There is in this case no escape from that position. The appellants Samanta Dhupi and Bhagwan must be acquitted.

With regards to Pyari Dhupi there are two flaws in his conviction. In the first place on the facts found by the Sessions Judge all that he did was to tie the body of Girish to a ladder. In one part of his judgment he says that it is not shown for certain whether Girish was dead when he was tied to the ladder. In another part of his judgment he says that Pyari helped to tie the body to the ladder because he was abused. Accepting these findings of fact it is clear in the first place that when Pyari lent his assistance it is not certain that the offence of murder had been committed. In the second place if indeed he only tied the ladder to the body of the deceased to avoid being abused it cannot be said that he assisted in disposing of the body with the intention of screening the murderers.

For these reasons I am of opinion that the three appellants should be acquitted and released.

**Chapman, J.**—I agree that the appellants must be acquitted and released. I desire however to guard myself from saying what my opinion would be if this case were one of first impression. I consider that I am bound by the decision in *Torap Ali and another v. Queen-Empress* (1). I am unable to distinguish the facts of the present case from the facts of that case, the Crown might well consider in a case of this kind which charge to prove and proceed upon that charge alone. It is unsatisfactory to have an alternative indictment one count charging the accused as principal and the other as accessory after the fact.

A. N. R. C.

*Accused acquitted.*

(1) (1895) I. L. R. 22 Calc. 633.

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## PRIVY COUNCIL.

—: O :—

PRESENT :—*Viscount Haldane, Lord Parmoor, Lord Wrenbury,  
Sir John Edge and Mr. Ameer Ali.*

M. R. M. A. SUBRAMANIAN CHETTIAR

v.

RAJAH RAJESWARA DORAI.

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October 21, 25, 26,  
November 3, 16.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

*Trust—Voluntary settlement—Trust estate—Mortgage—Trustee's power to create a charge, exercise of—Refund of payments made under an invalid mortgage—Practice—Compromise on behalf of a minor in a suit—Code of Civil Procedure (Act XLV of 1882), S. 462.*

Where a trustee has power to create a charge on the trust estate the power must be exercised properly and reasonably and in the interest of the estate.

Where a mortgage on the trust estate given by a trustee is held invalid and not binding on the properties therein comprised on the ground that the trustee was not acting properly and reasonably and in the interest of the trust estate when he gave the mortgage, the mortgagee or a person claiming through him, to whom payments have been made under the mortgage, would be ordered to make repayments to the credit of the trust estate.

*Held*, that the trustee of the voluntary settlement in this case was not acting properly and reasonably and in the interest of the trust estate in undertaking to give in favour of the settlor a charge on the trust estate in consideration of the settlor giving his consent to postpone the payment of certain allowances to be paid under the trust deed to him and the members of his family, on the ground either that the trustee failed to prove that such consent was required, under the

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terms of the trust deed or as a matter of fact, or that the settlor had prior to the said undertaking given his consent without consideration.

*Subramanian Chettiar v. Rajeswara Dorai* (1) affirmed.

The provision in the Code of Civil Procedure (1882), S. 462, making it necessary to obtain the leave of the Court to an agreement or compromise on behalf of a minor by his guardian with reference to the suit, is of great importance to protect the interests of a minor, and in the absence of such leave such an agreement or compromise is invalid.

*Manohar Lal v. Jadu Nath Singh* (2), and *Ganesha Row v. Tuljaram Row* (3) followed.

Appeal (No. 108 of 1913, one of the three consolidated appeals, the other two being Nos. 118 and 128 of 1913 respectively) from a judgment and decree of the High Court at Madras, dated the 21st April 1909, affirming with a slight modification those of the Court of the Subordinate Judge of Madras (East), dated the 30th March, 1903.

The principal question for determination was as to the validity of two mortgages, dated respectively the 6th July, 1899, and the 13th July, 1899, executed by the trustee of the Ramnad Estate in favour of the appellant.

The respondent's father, the late Raja of the Ramnad Zemindari, who was heavily involved in debt, executed a voluntary deed of settlement on the 12th July, 1895, whereby he conveyed the zemindari to a trustee in trust for the purposes therein mentioned. The object of the trust deed appeared to have been to save the zemindari in the interest of the present respondent who was then a minor. The appellant's father had advanced large sums of money to the late Raja both before and after the settlement. In 1897 the appellant's father brought a suit for the recovery of the debts due to him against the late Raja, the trustee and the present respondent, who being a minor was represented by the trustee as his guardian *ad litem*. By an agreement of compromise, dated the 16th January, 1899, made with the appellant (his father being then dead) the suit was settled and the appellant withdrew it.

That agreement was not sanctioned by the Court. In pursuance of the agreement of compromise the trustee executed the said two mortgages involved in this appeal in favour of the appellant.

On the 12th January, 1900, the appellant instituted the suit giving rise to appeal No. 128 to enforce the mortgage of the 13th July, 1899, and on the 22nd January, 1900, he brought another

(1) (1909) I. L. R. 32 Mad. 490.

(2) (1906) L. R. 33 I. A. 128 ; I. L. R. 28 All. 585.

(3) (1913) L. R. 40 I. A. 132 ; I. L. R. 36 Mad. 295.

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suit giving rise to appeal No. 118 to enforce the mortgage of the 6th July, 1899. On the 17th January, 1902, the respondent, not a party to either of these suits, by his next friend, brought the suit giving rise to appeal No. 108. It was admitted that the decision in this last mentioned appeal, which only had been argued, would govern the decision in appeals Nos. 118 and 128, to which no further reference is therefore made in this report. The principal relief claimed by the respondent was a declaration that the said agreement of compromise and the two mortgages were invalid and not binding on him and on the properties comprised in the said mortgages. The Subordinate Judge decreed the suit holding that all the three instruments were invalid as constituting breaches of trust and also because the agreement of compromise had not been sanctioned by the Court under the Code of Civil Procedure, 1882, section 462.

On appeal the High Court affirmed the decision of the Subordinate Judge on the first ground, varying, however, his decree in favour of the respondent on an incidental point. For a further statement of facts and a report of the judgment of the High Court, see *Subramanian Chettiar v. Rajeswara Dorai* (1).

*P. O. Lawrence K. C., De Gruyther K. C., and S. A. Kyffin*, for the Appellant, contended that the agreement with the Raja was a valid agreement and was binding on the trust estate, and reference was made to the Transfer of Property Act, section 53. The agreement of compromise of 16th January, and the mortgages of July, 1899, and the compromise of the suit of 1897, challenging the settlement deed were all *bona fide* transactions, and were within the power of the trustee, and binding on the trust estate. There was no breach of trust: the *onus* of proving such a breach lay upon the respondent and he had not discharged it. The trustee had power to enter into the agreement to pay 4 lakhs of rupees to the Raja; he was entitled to do it under section 36 of the Indian Trust Act since it was reasonable and proper for the protection of the trust property; see *Forshaw v. Hugginson* (2). Besides, the transactions could have been carried out without the suggestion of any breach of trust by the lenders advancing the 4 lakhs. Under such circumstances, it was submitted, the Court will not treat it as a breach of trust. *The Attorney General v. Mayor of Norwich* (3), and sections 43 (c), and 48 of the Indian Trust Act were referred to. The transaction it was submitted was not a breach of trust either as

(1) (1909) I. L. R. 32 Mad. 490, (2) (1857) 8 DeGex M. & G. 827.

(3) (1837) 2 M. & C. 414 (424).

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being improvident or not in the interest of the trust estate. The circumstances and the evidence showed that it was reasonable because the loan could not have been arranged if the obstacle to making it a first charge on the estate was not removed. The trustee therefore acted reasonably in continuing to carry out the agreement after the Raja had failed to get the consent of his brothers who received allowances. The trustee had power to compromise the suit of 1897 brought to set aside the deed of settlement. That suit was brought under section 53 of the Transfer of Property Act which repeated 13 Eliz. C. 5. In the English cases it was held that though such a deed was voidable as against creditors, it was good as against beneficiaries. The decisions under section 47 of the English Bankruptcy Act 1883 were distinguishable as that section made such a transaction void as against the trustee; see *San-Guinetti v. Stuckeys Banking Co.* (1); *In re Farnham* (2); *In re Sims* (3); and *Taugueray v. Bowles* (4); in which it was held that a trustee had committed a breach of trust in not having compromised a suit. The decisions in 1895 were distinguishable because the trustee had a good title under the deed in any case; it was not like a suit to declare a will invalid: reference was made to *In re Bagel's Estate* (5); *Graham v. McCachin* (6); and *Abdullah v. Richards* (7). Assuming then that the trustee had the power to make the compromise, it was contended it was not a breach of trust as being improvident, and the evidence discussed to show it was not so, references being made to *Freeman v. Pope* (8); and *Eaton v. Buchanan* (9) per Lord Atkinson. Even if the agreement were a breach of trust, the appellant, it was submitted, had no such notice of it as made them privy to it: see *Berell v. Dunn* (10); per Wigram V. C.; and *Hire Purchase Furnishing Company v. Richens* (11). Then can the minor claim that the compromise was void because the sanction of the Court was not obtained for it as required by section 462 of the Civil Procedure Code, 1882. It was not an agreement made on behalf of the minor, and section 462, it was contended, did not apply. The compromise was made by the trustee as trustee, not as guardian of the minor; it was come to by the trustee acting on behalf of the whole estate; he did not purport to act on behalf of the minor; the guardian *ad litem* could not have prevented it.

(1) (1895) 1 Ch. 176.

(2) (1895) 2 Ch. 799; 45 W. R. Eng. 189.

(3) (1896) 3 Manson, 340.

(4) (1872) 14 Eq. 151.

(5) (1900) 1 I. R. 496.

(6) (1901) 1 I. R. 404.

(7) (1888) 4 Times L. R. 622.

(8) (1870) L. R. 5 Ch. App. 538.

(9) (1911) A. C. 253.

(10) (1843) 2 Hare 440 (452).

(11) (1887) 20 Q. B. D. 387.

[*Mr. Amcer Ali*. All the subsequent proceedings were deliberately kept out of Court to avoid section 462].

It was a transaction affecting all the parties. *Ganesha Row v. Tuljaram Row* (1) was distinguishable: the compromise in question in that case was expressly made on behalf of the infant who had an interest in the property. In any case the compromise could only be set aside on restoring the parties to their original position.

*Sir R. Finlay K. C.* and *Kemworthy Brown*, for the Respondents, contended that there were concurrent findings of fact by the Courts below; and the appellant had not succeeded in attacking the decisions of the lower Courts on the questions of law. There was by law no appeal on the facts. The first defendant was not called. The whole case was that the trustee was always willing to adopt the Raja's point of view, and the Raja succeeded in getting the trustee to burden the estate with post settlement debts, while the sole object of the settlement was to free the estate from all debts. As to the arrangement to borrow 4 lakhs it was the duty of the trustee to get the annuitants to postpone their claim; but he made no such endeavour, but merely acceded to the Raja's wishes. The trustee had, as he knew, power to postpone the annuitants' charge on the estate. Consent had been given a year before in 1897. Both Courts had agreed in finding that the trustee was not acting in the proper execution of the trust. The transactions in question were not enforceable against the respondent or the trust property, because the compromise was invalid as not having been sanctioned by the Court under section 462 of the Code of 1882. The price of the compromise greatly affected the interest of the minor. Reference was made to *Ganesha Row v. Tuljaram Row* (1); and *Manohar Lal v. Judu Nath Singh* (2). The attention of the Court must, under that section, be drawn either by petition or otherwise to the fact that a minor is a party to the suit and the leave of the Court to compromise it must be obtained. It was not sufficient in this case that the *vakil* for the guardian *ad litem* was said to have consented to it. The whole compromise was improper and void. The agreement of 16th January having failed there was no power to enter into the contracts of mortgage of 6th, and 13th July; they were therefore in fraud of the respondent, and were as the trustee knew, breaches of the trust.

Counsel for the respondent was stopped, and the appellant was called upon, but had nothing to add in reply.

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(1) (1913) I. L. R. 36 Mad. 295; L. R. 40 I. A. 132.

(2) (1906) I. L. R. 28 All. 585 (589); L. R. 33 I. A. 128 (131).



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November, 16.

The judgment of their Lordships was delivered by  
**Lord Parmoor** :—These are consolidated appeals from three judgments of the High Court of Judicature at Madras. The appeal which has been argued before their Lordships is one in which M. R. M. A. Subramanian Chettiar is appellant, and Rajah Rajeswara Dorai is respondent. It is unnecessary to refer further to the other two appeals since it is admitted that the decision in those cases depends on the decision given in the case which has been argued.

The question involved in the appeal is the validity of an agreement of compromise executed on the 16th day of January, 1899, and of two mortgages, dated respectively the 6th July, 1899, and 13th July, 1899. The validity of these documents is largely dependent on the consideration whether the trustee under a voluntary settlement of 12th July, 1895, had power to give a mortgage bond for 4 lakhs of rupees on the security of a suitable portion of the Ramnad estate to the then Rajah of Ramnad.

The father of the appellant lent considerable sums to the respondent's father, who at all material times was the Rajah of Ramnad. On the 12th July, 1895, the Rajah owed his creditors sums of money amounting to 20 lakhs of rupees, including a sum of Rs. 1,30,000, which he owed to the appellant's father. At that date the Rajah executed a deed of voluntary settlement settling all his Ramnad zemindary and certain other property, subject to the payment of the debts which he then owed and to certain allowances to members of the family including the Rajah himself therein directed to be made and to the several trusts, provisos, and declarations therein contained, on the present respondent, who was a minor. The Rajah appointed as trustee Venkata Rangier, and as coadjutor P. Chentsal Rao, and it was provided that the trustee should not without the permission in writing of the coadjutor enter into any agreement with the creditors or mortgage or sell any part of the trust premises. Subsequent to the execution of the voluntary deed, the Rajah borrowed further sums from the appellant's father giving as security certain jewels and furniture and his allowance under the deed of settlement.

The sums due to the creditors had been borrowed at a high rate of interest, and the income in the hands of the trustee was not sufficient to meet the charges on the trust estate. To save the estate, it became necessary to borrow a large sum of money at a moderate rate of interest, and negotiations were entered into between the trustee, the coadjutor, and certain financiers in England. On the 18th June, 1897, a preliminary agreement was made between

the trustee, Charles Augustus Verner, and Ogilvie, Gillanders, & Co., to raise for payment of the debts existing at the date of the settlement of the 12th July, 1895, the sum of 160,000/., and the equivalent in sterling of the Government revenue for a quarter of one year, to be secured by a trust deed vesting the Ramnad zemindary freed from all incumbrances in trustees for debenture-holders. This arrangement was not completed until the 13th of June, 1899, on which date the trustee, with the privy and consent of the coadjutor and the Rajah, executed a mortgage of the whole trust estate for the sum of 175,000/., repayable by instalments with interest at the rate of 5 per cent. The validity of this deed is not in question. Before its execution there were prolonged negotiations between the trustee and the intending lenders. Their Lordships recognise the difficulties which confronted the trustee and it was clearly of the first importance to obtain a large loan at a moderate rate of interest in order to pay off debts carrying compound interest at the rate of 12 per cent.

In the course of the negotiations for the English loan the intending lenders required that the Rajah should become a party to the deed, and that the allowances specified in the voluntary deed should be expressly postponed to their security. It is contended on behalf of the appellant that in order to obtain the assent of the Rajah, and the consent of the persons entitled to the payment of allowances, it became necessary, and was reasonable and prudent on the part of the trustee, to agree to give a mortgage for 4 lakhs of rupees to the Rajah on the security of a suitable portion of the Ramnad estate, such security being subsequent to the mortgage given for securing the repayment of the English loan. This proposal is contained in a letter from the trustee to the Rajah on 25th April, 1898, and on the same day the Rajah wrote to the agents of the intending lenders informing them that in the event of their advancing to the trustee a loan on the agreed conditions he would agree that the lenders, or their nominees, should have a first charge upon the Ramnad zemindary, and that no part of the marginally-noted allowance payable to him under the voluntary settlement should be paid in any year until all charges, that might be payable to the lenders under the present mortgage, had been paid in full, and that he undertook to execute in favour of the lenders or their nominees such documents as in their opinion might be necessary for carrying out the arrangements. The High Court of Madras have held that assuming—without deciding—it to be within the power of the trustee to create such a charge on the trust

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estate, the power was not exercised properly and reasonably and in the interest of the estate. Their Lordships concur in the conclusions of the High Court. There is no satisfactory evidence that the Rajah would not have executed the English mortgage deed and consented to postpone his allowance without some payment or consideration. The Counsel for the appellant was pressed in his argument before their Lordships to refer them to the evidence in support of his proposition that the Rajah would not have assented to sign the deed and postpone his allowance without receiving payment or consideration. Their Lordships were not referred to any such evidence and the Counsel for the appellant relied on a general statement that the Rajah was a difficult person for the trustee to influence. Apart from any payment or consideration it was in the interest of the Rajah that the intending loan should be satisfactorily arranged and, in the absence of evidence, there is no room for a presumption that he would not sign the deed, or would refuse to postpone his allowance, without some payment or consideration. On the other hand, the documents to which their Lordships have been referred do not support the contention put forward on behalf of the appellant.

The preliminary agreement for the loan was signed on 18th June, 1897. On the 22nd September, 1897, the coadjutor, P. Chentsal Rao, without whose assent the trustee had not the power to arrange the English loan, sent a telegram to Messrs. Lovelock and Lewes, Chartered Accountants, acting on behalf of the lenders, that:—"the Rajah consented to sign mortgage deed and Rs. 66,000 or possibly Rs. 76,000 of the allowances can be postponed, letter follows." A further telegram was sent on the 28th September 1897 explaining that the Rajah was willing to give a charge upon the zemindary free of the payment of allowances of Rs. 66,000 and possibly Rs. 76,000, and that this is what the coadjutor meant by postponement. These telegrams were followed by a letter of 29th September 1897 in which the later telegram was confirmed, and the coadjutor again states, that the Rajah is quite willing to do what Messrs. Lovelock and Lewes propose, namely, to give a charge on the zemindary free from the payment of Rs. 66,000 or possibly Rs. 76,000, out of the allowances of Rs. 1,30,000, referred to in the trust deed. The position taken up by the intending lenders on the question of the allowances is explained in a letter of 25th November 1897 which was brought to the notice of the trustee, and to which the trustee refers in a letter of 24th December 1897. It is stated that the intending lenders are

prepared to proceed with the negotiations for the loan provided that all the allowances in favour of the Rajah and the members of his family are postponed to the security to be given to the debenture-holders, both as regards the current payment required for the service of the loan and also in the event of the security having to be enforced. The consent of six members of the Rajah's family was not obtained to the postponement of the allowances, but the consent of the other allowance-holders was accepted as sufficient after the intending lenders had obtained an opinion from Mr. Mayne that such consent was not required having regard to the terms of the trust deed.

The material factor is that the letter written by the Rajah on 25th April 1898, after receiving the promise of a payment or consideration of Rs. 4,00,000 secured by mortgage bond on a suitable portion of the Ramnad estate, does not give any undertaking beyond that contained in the telegrams and letter of September 1897. Under these circumstances their Lordships are of opinion that the appellant has failed to prove the first step which is necessary to justify the placing of a charge of Rs. 4,00,000, on the trust estate.

In the second place the appellant has failed to establish that the consent of the allowance-holders was required to enable the trustee to postpone their rights to the security of the debenture-holders, or that the intending lenders would have pressed their objection if the legal position had been explained to them. This point was not argued at any length before their Lordships, though it was evidently a main point in the argument in the High Court. The relevant paragraphs of the voluntary settlement are 7, 23, and 24. In paragraph 23 the settlement sets out in the sixth place a trust to make payment of the allowances specified in the second schedule, but these allowances are placed for the purpose of payment after (in the fifth place) the specified debts and the interest on and principal of such other debts and sums of money as shall be incurred or become payable by the trustee for the purpose of paying off all or any of the said debts and sums of money, although under paragraph 24 the trustee is not bound to make the payments in the order mentioned in the deed. Paragraph 7 provides that notwithstanding anything contained in the voluntary settlement, an assign for value in execution of those trusts should hold the estate or interest purporting to be conveyed or assigned to him, in the premises thereby assigned free and discharged of the trusts, provisos, directions, and declarations therein contained, except as otherwise expressly provided in such assignment. The joint effect of sections

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7 and 23 is that the trustee had power to place the loan security for the payment of the specified debts in priority to the allowance payments and that the assign for value would hold the estate or interest conveyed or assigned to him assured free and discharged of the trusts contained in the voluntary settlement except as otherwise expressly provided.

Section 24, which provides that the trustee shall make the several payments under the voluntary settlement as and when the same shall be required, cannot be construed to curtail the discretion given to the trustee in paragraph 23. It is material to observe that the trustee in a telegram to the coadjutor on 18th March, 1898, said that he and the coadjutor must point out to the London people that under the trust deed they are empowered to attend to the service of interest prior to payment of allowances. A similar opinion was expressed by Sir V. Bhashyam Iyengar on 30th June, 1898, and by Mr. Mayne on 20th September, 1898. The counsel for the appellant justified the action of the trustee in giving consideration for the consent of the Rajah to postponement, although such consent was not legally required, on two grounds. In the first place he said that, apart from questions of strict right, the intending lenders insisted on the postponement of the specified allowances. The answer is that there is no evidence that the intending lenders would not have altered their attitude if the true legal position had been insisted on throughout the negotiations. They did alter it so far as regards six of the allowance-holders, after obtaining the opinion of Mr. Mayne. In the second place it was said that, although the trustee might have had the power to postpone the payment of allowances, he was justified in his action out of regard to the position of the Rajah and his family, and his unwillingness to incur the ill-will of the Rajah and of the other allowance-holders, which he might have incurred if he had used his power without their consent. Their Lordships cannot accept this explanation as justifying the trustee in placing a burden of Rs. 4,00,000 on the trust estate, or come to any other conclusion than that the trustee was not acting properly and reasonably and in the interest of the trust estate when he undertook to give the mortgage bond to that amount in favour of the Rajah.

The next question is whether the agreement of compromise of 16th January, 1899, and the two mortgages of the 8th and 16th July, 1899, can be supported if the promise to give the mortgage bond of Rs. 4,00,000, on the security of the trust estate is invalid as not being within the powers of the trustee. The recitals of the compromise deed recite the agreement with the Rajah to give a

mortgage bond for Rs. 4,00,000, on the trust estate, thus giving the appellant full notice. Moreover the compromise deed is based, not on imposing a new charge on the trust estate, but on utilising the charge, already promised to the Rajah. The deed carries out this proposal by providing for the payment of certain sums to the appellant so soon as the English loan is obtained, and by giving as security a third mortgage on the trust estate, a first mortgage being executed to secure the English loan, and a second to secure the loan of Rs. 1,00,000 due to another creditor. In other words the compromise deed assumes the validity of the agreement with the Rajah and there is no evidence that the trustee or the coadjutor had any intention, apart from the agreement with the Rajah, to place an additional charge in favour of the appellant on the trust estate.

The mortgage of the 6th July, 1899, was executed in pursuance of the provision contained in the deed of compromise. The amount thereby secured was Rs. 4,73,143, with further interest thereon less the sum of Rs. 50,000 which the trustee agreed to pay in one week. Towards this sum the trustee paid to the appellant Rs. 20,000, and secured the balance by a mortgage on crops on the 13th July, 1899. This is the second mortgage to which this appeal relates. On the second mortgage the appellant has received certain payments from the trustee and has been ordered to repay the sums to the credit of the trust estate. It is impossible that these mortgages can be regarded as valid and binding upon the properties therein comprised if the deed of compromise is not valid, and their Lordships concur in the conclusion of the High Court both as to the validity of the deed of compromise and of the two mortgages and as to the amount of the repayment ordered to be made by the appellant to the credit of the trust estate.

If on other grounds the deed of compromise could be supported, it is invalid in not complying with the condition imposed by section 462 of the Code of Civil Procedure applicable when the compromise was made. One of the parties to the suit, the Rajah's son the first respondent, was a minor, and the trustee of the voluntary settlement was appointed his guardian *ad litem*. Section 462 of the Code of Civil Procedure enacts "that no next friend or guardian for the suit shall, without the order of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian." In the present case the leave of the Court was not obtained, and in the absence of such leave the compromise cannot be supported. Their Lordships

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regard the provision making it necessary to obtain the leave of the Court as of great importance to protect the interests of a minor. It clearly applies to the compromise in question in the present appeal. It may be well to quote the language used by Lord Macnaghten in *Monohar Lal v. Jadu Nath Singh* (1) :—

"It is not sufficient that the terms of a compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained."

Reference may also be made to the more recent case of *Ganasha Row v. Tuljaram Row* (2).

In the opinion of their Lordships these appeals fail and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

*Douglas Grant* : Attorney for the Appellant.

*Chapman-Walker & Shepherd* : Solicitors for the Respondents.

J. M. P.

*Appeals dismissed.*

(1) (1906) L. R. 33 I. A. 128.

(2) (1913) L. R. 40 I. A. 132.

PRESENT :—*Viscount Haldane, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.*

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## THE BANK OF BENGAL

v.

RAMANATHAN CHETTY AND OTHERS.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

*Principal and agent—Power of attorney—Construction—Excess of authority—Money-lending business—Liability of principal deriving no benefit—Promissory note—Guarantee by agent.*

Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.

*Bryant, Powis, and Bryant Ltd. v. La Banque du Peuple* (1) approved and followed.

(1) L. R. (1893) A. C. 170 (177).

If it is established that the transaction in question is within the authority conferred by the power of attorney, the mere fact that the principal did not receive any benefit from the transaction does not rid him of his liability.

The defendant, a Chetty moneylender and financier, gave a power of attorney to an agent, who managed the entire business. The power gave the agent authority to borrow "either with or without pledge of the securities." The agent agreed with a constituent of the firm that the agent should pledge the firm's credit with the plaintiff bank to enable the constituent to have a cash credit account opened in his name and obtain from the bank advances not exceeding in the aggregate a certain amount, and that to secure the due payment of this amount he should execute a promissory note in favour of the defendant's firm which the agent on his side should endorse over to the bank. A promissory note for the above-mentioned amount was executed by the constituent in favour of the defendant's firm, and was endorsed over by the agent to the Bank, to which the agent on behalf of his firm gave a letter of guarantee in respect of the transaction. The constituent became bankrupt and the bank brought the suit against the defendant who denied the agent's authority to enter into the transaction so as to bind his firm. It was proved that the agent had entered with the bank into a number of other similar transactions and the defendant had never raised the question that such transactions were in excess of the agent's authority. There was also evidence to show that what the agent did was in accordance with the practice among other Chetty firms doing the same class of business :

*Held*, that both the constituent and the defendant's firm became severally liable on the note, one as the drawer, the other as the endorser, for advances to the constituent on his credit account ; that the agent had express authority to borrow in order to lend to others, and the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to constituents ; that with regard to the transaction in question it was a matter of convenience that the agent instead of receiving the money directly himself and lending it to the borrower (the constituent) authorised the lender (the bank), on the pledge of the firm's credit to advance the money to the borrower, and that the authority to enter into transactions of the nature in dispute was to be found in the power of attorney (in this case) itself by necessary implication from the nature of the business, with the general management of which the agent was entrusted.

Appeal from a decree, dated the 26th March 1914, of the Chief Court of Lower Burma on its Appellate Side, reversing a decree of the same Court on its Original Side, dated the 30th August 1912, in favour of the appellant.

On the 23rd of May 1908, the appellant Bank opened a cash credit account with one Hashim Ebrahim taking as security a promissory note of that date payable on demand for Rs. 50,000 and interest made by Hashim Ebrahim in favour of A. R. L. Chockalingam Chetty or order and endorsed by Chockalingam Chetty to the appellant Bank. On the same date Chockalingam executed in

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the name of "A. R. L. Chockalingam Chetty" an agreement guaranteeing to the appellant Bank repayment of all sums which might be due to it from time to time upon the said cash credit account. Chockalingam endorsed the said promissory note and executed the said guarantee agreement in the capacity of agent for L. A. R. L. Lutchumanan Chetty who was then carrying on business in Rangoon as a Chetty banker and money-lender under the style of A. R. L. by his agent the said Chockalingam Chetty who held a power of attorney given to him by his predecessor Ramasawmy Chetty under a power of substitution contained in a power of attorney given to the latter by L. A. R. L. Lutchumanan Chetty. The appellant Bank made advances upon the said cash credit account to Hashim Ebrahim who became insolvent and absconded and made default in repaying the same and the appellant Bank thereupon called upon L. A. R. L. Lutchumanan Chetty to pay the amount due. L. A. R. L. Lutchumanan Chetty denied liability alleging that his agent Chockalingam had no authority to endorse the promissory note or to execute the guarantee agreement on his behalf.

The appellant Bank on the 16th February 1911, brought the present suit against the A. R. L. Chetty firm as guarantors for the recovery of Rs. 63,122-12-5 due for principal and interest upon the said cash credit account. The defendant filed his written statement stating *inter alia* that he denied that he ever gave the guarantee sued upon, that neither Ramasawmy nor his substitute Chockalingam had power to endorse accommodation bills or to give guarantees for third persons so as to bind the defendant, and that he alleged that he was not liable upon the guarantee alleged to have been given by the said Chockalingam, that the appellant Bank had full knowledge of the terms of the powers of attorney held by Ramasawmy Chetty and Chockalingam Chetty and well knew that Chockalingam had no authority either under the terms of his power of attorney or otherwise to bind the defendant by any guarantee, that he had long prior to the transactions in dispute in express terms prohibited Chockalingam from entering into any guarantees for other persons and that he was informed and believed that prior to such transactions the appellant Bank had knowledge of such prohibition, and that there was no consideration for the alleged guarantee. It was admitted that the powers of attorney given to Ramasawmy and Chockalingam respectively were registered in the books of the appellant Bank before the guarantee was given.

The appellant Bank further pleaded in reply that even if the

agent Chockalingam had no power to enter into the guarantee the defendant had ratified his action in so doing.

The issues in the case were as follows :—

1. Had Chockalingam Chetty authority to enter into the guarantee on behalf of defendant ?
2. Did Lutchumanan Chetty forbid him to enter into such guarantees and if so has that the effect of rendering his guarantee illegal ?
3. Was there no consideration for the guarantee ?
4. If the guarantee was beyond his powers was it ratified by his principal ?

Robinson J., who tried the suit, decreed it. He found that the guaranteeing of other persons' accounts was a common practice amongst Chetties in Rangoon but held that the Chockalingam had no authority under his power of attorney to guarantee the cash credit account of Hashim Ebrahim upon the ground that it had not been proved that L. A. R. L. Lutchumanan Chetty was "interested or concerned" in the transaction. He held further that there was no evidence that L. A. R. L. Lutchumanan Chetty had never expressly forbidden his agent to enter into such guarantees ; that it had been proved that the appellant Bank had received no notice of any such prohibition ; that L. A. R. L. Lutchumanan Chetty had held out his agent as having authority to give guarantees and had ratified and confirmed the guarantee sued upon ; and that there was consideration.

On defendant's appeal (Ormond and Parlett, JJ.), affirmed the finding of the Court below that the agent had no authority under the power of attorney to enter into the guarantee on the ground that the power of attorney did not expressly empower him to guarantee debts : and held that as the guaranteeing of debts was not a necessary incident in the carrying on of a Chetty banking and money-lending business such a power could not be implied from the fact that he was appointed for the purpose of carrying on such business. They reversed the findings of the Court below that the agent had been held out as having authority to guarantee debts and that the transaction in question had been ratified by L. A. R. L. Lutchumanan Chetty. The Court therefore by its decree allowed the appeal and dismissed the suit with costs in both Courts.

*Sir H. Erle Richards, K. C., and Coltman*, for the Appellants : It is the practice of the Bank, as required by the Presidency Banks Act (XI. of 1876), section 37, cl. (e), not to open cash credit accounts on the security of any promissory note unless the drawer

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and the endorser become severally liable on the note for the advances made by the Bank on the cash credit account. Ebrahim and the respondent are severally liable on the note in question. But on behalf of the latter it is contended that his agent had no authority to enter into any transaction like the one in question. But whether Chockalingam had the authority or not depends upon the terms of the power of attorney, and on a fair construction thereof, it is submitted, he had express authority or at any rate he had authority by necessary implication : *Bryant, Powis, & Bryant v. La Banque Du Peuple* (1). The oral evidence, which is distinct and unchallenged, shows that this class of transaction is common in a Chetty's business. The transaction is an incident of the business, and it is submitted that the power of attorney authorises this class of transaction. Besides, the evidence shows that the respondent's agent had entered with the Bank into a number of identical transactions during a course of three years, and that the respondent has never questioned any of them, and consequently the agent's authority must be implied : Indian Contract Act, section 187. The respondent, though called upon, did not produce his account books, and it must be presumed that had he produced them, they would have shown entries of such transactions, and of commissions received thereon. The case of *Fitzgerald v. Dessler* (2) is distinguishable. There the principal was on the spot and the agent did not have the wide and general authority as in this case.

*Newbolt, K. C.*, and *G. S. Sanders*, for the Respondents : A Chetty's business is to lend money on security repayable on a certain date at a fixed rate of interest, and the transaction in question does not fall within this description. The object of the power of attorney as contained in the recitals and general words must be construed to give only the necessary power to carry out the object. The transaction in question was not a money-lending transaction, but it was really entered into for the purpose of accomodation. Such a transaction was outside the power. Further the Bank was bound to enquire whether the agent had authority, but it neglected to inquire, and could not recover from the respondent the amount claimed : *Jacobs v. Morris* (3), and *In re Dawson and Jenkin's Contract* (4) were relied on, and the case in (1893) A. C. 170 was distinguished. It is for the appellant Bank to prove that the agent

(1) (1893) L. R. A. C. 170 (177).

(2) (1859) 7 C. B. N. S. 374.

(3) L. R. (1901) 1 Ch. 261, affirmed on appeal (1902) 1 Ch. 816.

(4) L. R. (1904) 2 Ch. 219.

had the authority to enter into the transaction and also that the respondent had knowledge of the transaction : *Pelo v. Leash* (1). But the Bank has not discharged that *onus*. The circumstances that though notice was given the defendant did not produce the account books, affords no legal ground for any inference respecting their contents, but merely entitles the Bank to prove their contents by parol evidence : *Cooper v. Gibbons* (2). The Bank has, however, given no evidence to show that a transaction like this was the ordinary course of the respondent's money-lending business and that he derived benefit from such transactions. Moreover, the transaction being merely for the purpose of accommodation, would not appear in the books. No presumptions arise, as contended, under section 114 of the Indian Evidence Act. The appellant Bank failed to prove authority and the judgment of the Court below is right.

Appellants were not called upon to reply.

The judgment of their Lordships was delivered by

**Mr. Ameer Ali** :—This is an appeal from the Chief Court of Lower Burmah, and the sole question for determination is whether the agent in Rangoon of the original defendant to the action, Lutchumanan Chetty, since deceased, now represented by the respondents, had authority to enter into the transaction with the plaintiff bank on the basis of which it seeks to enforce the present claim against the principal.

Lutchumanan Chetty was a native of Madras, and ordinarily resided there. He belonged to the well-known Chetty money-lending caste, and had a large and apparently lucrative money-lending business in Rangoon, which he carried on by agents, under the name and style of "Ana Roona Laina," or shortly "A. R. L. Chetty." Previous to 1904 he had two partners, but after the death of one and the retirement of the other in that year, he was the sole owner of the business.

By a power of attorney dated the 24th of October 1904, he appointed one Ramaswamy Chetty, described in the document as "at present of Rangoon," as his attorney under "the style or firm of Ana Roona Laina or A. R. L. Ramaswamy Chetty." On the 15th of May, 1905, Ramaswamy, by the power reserved to him in his appointment, substituted in his place one Chockalingam Chetty "as the attorney and agent" of the defendant. And since his

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(1) (1862 & 1864) 33 L. J. Ch. 155.

(2) (1813) 3 Campbell's Reports, 363.

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appointment Chockalingam admittedly has managed the entire money-lending business of the defendant's firm in Rangoon.

The transaction which forms the basis of the present claim was entered into in May 1908. It appears that about this time one Hassum (or Hashim) Ebrahim, with whom Chockalingam had previous dealings and who was evidently a constituent of the firm, applied to him for financial assistance. He acceded to the request, and the arrangement that was come to between them was in substance this, that Chockalingam should pledge the firm's credit with the plaintiff bank to enable Ebrahim to have a cash credit account opened in his name and obtain from the bank advances not exceeding in the aggregate Rs. 50,000, and that to secure the due repayment of this amount with interest thereon he should execute a promissory note in favour of the defendant's firm which Chockalingam on his side should endorse over to the bank.

It is to be observed in this connection that under the provisions of The Presidency Banks Act (XI. of 1876, s. 37, cl. e), the Bank is precluded from opening cash credits on the security of any negotiable instrument of:—"any individual or partnership firm ... which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership."

It was in view of this provision of the law, and the practice of the Bank in conformity therewith, that the promissory note for Rs. 50,000, bearing the usual bank rate of interest, was executed on the 23rd May 1908, by Ebrahim in favour of "A. R. L. Chockalingam Chetty," the name under which the defendant's firm admittedly carried on business in Rangoon. This note was endorsed over by Chockalingam to the Bank. Thus both Ebrahim and the Chetty firm became severally liable on the note, one as the drawer, the other as the endorser, for advances to Ebrahim on his cash credit account.

At the same time and on the same date Chockalingam gave to the plaintiff Bank a letter of guarantee on behalf of his firm. It stated the nature of the transaction and the character of the obligation undertaken by the Chetty firm in these terms:—"In consideration of the Bank of Bengal having agreed at our request to grant to Hassum Ebrahim (who is hereinafter referred to as the Borrower) accommodation by way of Cash Credit to such an amount from time to time as the Bank in its discretion shall think proper upon condition that such cash credit shall to the extent of Rs. 50,000 and interest be secured by the promissory note hereinafter men-

tioned we the undersigned A. R. L. Chockalingam Chetty (guarantor) have delivered to the Bank of Bengal a promissory note, dated 23rd May 1908, for Rs. 50,000 and interest payable on demand made by the said borrower in favour of us and endorsed by us to the said Bank or order (the said promissory note being intended as a guarantee to the extent of Rs. 50,000 and interest of the balance from time to time due to the said Bank from the said borrower on account of the said cash credit) on the understanding that the Bank shall be at liberty to take steps to enforce payment of the said promissory note at any time after notice in writing demanding payment thereof posted to us at our usual or last known address and default being made in payment for three days after the posting of such notice."

Ebrahim appears to have drawn considerable sums of money on the cash credit account thus opened. He was adjudicated an insolvent shortly after, and his assets vested in the official assignee. He himself is said to have absconded.

The plaintiff Bank thereupon called upon the defendant to pay the amount due from Ebrahim, and on his failure to do so, brought the present action in the Chief Court of Lower Burmah in its original civil jurisdiction. The defence to the action in the main is the denial of authority on the part of Chockalingam to enter into the transaction so as to bind the defendant's firm.

The case was at first heard *ex parte*, owing to the default of the defendant to enter appearance, but the *ex parte* decree was set aside, and the suit came on for trial as a contentious cause on the 17th January 1912, before Ormond, J., who framed the issues and took part of the evidence. It was heard subsequently by Robinson, J. The defendant, besides putting in the power of attorney and the instrument substituting Chockalingam in place of Ramaswamy, adduced no evidence; and Robinson, J., held in substance that, although there was no express authority to the agent to enter into a transaction of this nature the defendant subsequently ratified and confirmed the act, and was therefore clearly liable. He accordingly decreed the plaintiffs' claim. The appellate Court did not agree with this view. The learned Judges further considered that if guaranteeing the loans of others was to be regarded as "a necessary incident of the business, it would not be so much a money-lending business as an insurance business."

They accordingly dismissed the suit.

In their Lordships' opinion this judgment cannot be supported.

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The learned Judges seem to have missed the real point at issue. They do not appear to have correctly apprehended the character and extent of the powers entrusted to the agent, or the nature of the business which he conducted and managed on behalf of the defendant in Rangoon.

Their Lordships desire to refer shortly to the principal provisions of the power directly bearing on the question raised in the case. After setting out that he was formerly carrying on the business of "bankers and money-lenders in Rangoon" in co-partnership with two other persons, and that owing to the death of one partner and the retirement of the other, he was then "solely carrying on the same business" under the style of A. R. L. Chetty, and that he was desirous of appointing Ramaswamy Chetty as his attorney for the general management of his said business, the defendant (Lutchmanan Chetty) proceeds to state the duties with which he charges the agent and the powers he entrusts him with :—

"To transact, conduct, and manage all and every or any of the affairs, concerns, matters, and things in which I, the said L. A. R. L. Lutchmanan Chetty, now am or hereafter may be in any wise interested and concerned, and for that purpose to use or sign my name to all and every or any documents or document writings or writing whatsoever. To borrow money from any bank or banks, firm or firms, person or persons, either with or without pledge of securities for moneys advanced to various persons."

The authority to borrow is given in explicit and the broadest terms, "either with or without pledge of the securities" lodged with the agent by constituents for moneys advanced to them.

The power then goes on to declare :—

"To make draw sign accept endorse negotiate and transfer all and every or any Bills of Exchange Promissory Notes Hundis Cheques Drafts Bills of Lading and all and every other negotiable securities whatsoever to which my signature or endorsement may be required or which my said attorney may in his absolute discretion think fit, to make draw sign accept endorse negotiate and transfer in my name and on my behalf."

It is to be borne in mind that the defendant's business was a general money-lending business, in the course of which he financed both Chetties and non-Chetties. The agent had express authority to borrow. For what purpose? To lend to others. It was an essential incident of the business; and the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to constituents. It was a matter

of convenience that, instead of receiving the money directly himself and lending it to the borrower, he authorised the lender, in this case the bank, on the pledge of the firm's credit, to advance the money to the borrower.

Applying to the power in the present case the canon of construction laid down in *Bryant, Powis, and Bryant, Ltd., v. La Banque du Peuple* (1), viz.—“that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication,” their Lordships consider that the authority to enter into transactions of the nature in dispute is to be found in the document itself by necessary implication from the nature of the business, with the general management of which the agent was entrusted. Without such authority it would hardly have been possible to carry on the business of a money-lender and financier.

It is clear from the facts proved in the case that for three years it was accepted, and business was transacted on the basis, that the agent was invested with full authority in that behalf. For between May 1905 and May 1908, Chockalingam entered into twenty-three identical transactions without, so far as appears on the record, any question being raised that they were in excess of his authority. Besides, there is evidence that among these Chetty money-lending firms it is the practice for the agent to pledge the credit of the principal in this manner.

It was urged on behalf of the defendant that it was not shown he had received any benefit from the transaction in question. Their Lordships think that if authority is established the mere fact that the principal did not receive any benefit does not rid him of his liability. But it is to be observed that the case of the plaintiff bank was that the defendant's books of accounts would show receipt of commission on the transaction. It called upon the defendant to produce those books, which he failed to do; nor was Chockalingam called to support his allegation in respect of the non-receipt of commission.

Their Lordships are of opinion that the decree of the Chief Court should be set aside, and that of Robinson, J., should be

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(1) L. R. (1893) A. C. 170 (177).



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restored. The respondents must pay the costs of this appeal and of the appeal in the Chief Court.

And their Lordships will humbly advise His Majesty accordingly.

*Arnold & Son*:—Solicitors for the Appellants.

*Bramall and White*:—Solicitors for the Respondents.

*Appeal allowed.*

J. M. P.

PRESENT:—*Viscount Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.*

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v.

BURJORJI DHUNJIBHAI CONTRACTOR.

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November, 11, 12, 15  
December, 6.

(ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.)

*Ven for and purchas:—Contract to sell land—Indian Contract Act (IX of 1872), S. 55—Time, the essence of the contract—Time for completion fixed by the contract, effect of—Specific performance—Un due delay—Intention—Forfeiture of deposit and power to resell, if contract not completed within a fixed time.*

Where in a suit for specific performance of a contract to sell land, the issue is whether time is of the essence of the contract, the law applicable to the point is contained in the Indian Contract Act S. 55, which does not lay down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under English law, equity, which governs the rights of parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. That section adopts and embodies in reference to sales of land that doctrine which is laid down in *Lennon v. Napper* (1); *Roberts v. Berry* (2); *Tilley v. Thomas* (3) and *Stickney v. Keeble* (4).

The Court will apply the doctrine, if it can do justice between the parties, and if there is nothing in the express stipulation between the parties, the nature of the property or the surrounding circumstances which would make it inequitable to interfere with or modify the legal right.

(1) (1802) 2 Sch. and Lef. 682.

(2) (1852) 3 D. M. and G. 264.

(3) (1878) L. R. 3 Ch. App. Cas. 61.

(4) L. R. (1915) A. C. 386.

The application of the doctrine may be excluded by any plainly expressed stipulation, if its language plainly excludes the notion that the fixed time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation.

The doctrine however will not be applied where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time.

The Court will infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract, the construction of which, however, cannot be affected by what takes place after it has once been entered into.

A stipulation in a contract of sale of land that should the purchaser not pay the balance of the purchase-money within the period therein fixed he was to have no right to the deposit paid on account, and any claim of his was to be void, and the vendor was, after the fixed date, to be at liberty to resell, was *held* not to make time of the essence of the contract.

*Burjorji Dhunjibhai Contractor v. Jamshed Khodaram Irani* (1) reversed.

Appeal from a judgment and decree of the High Court of Bombay (February 17, 1913), reversing those of a single Judge (July 30, 1912).

The facts are sufficiently stated in the judgment of their Lordships. The suit giving rise to the appeal was brought by the plaintiff-appellant for specific performance of an agreement of the 8th July, 1911, made by the defendant-respondent to sell certain lands to the appellant, and in the alternative for damages and other relief. Macleod, J., gave the plaintiff a decree for specific performance, but on appeal that decree was reversed by Scott C. J., and Chandavarkar, J., and the suit was dismissed with costs. For a report of the judgment of the High Court see *Burjorji Dhunjibhai Contractor v. Jamshed Khodaram Irani* (1).

*Sir Robert Finlay, K. C.*, and *Brown*, for the Appellant: The law applicable to the case is to be found in the Indian Contract Act, S. 55, according to which the appellant must succeed unless the respondent shews that the intention of the parties at the time of making the contract was that time should be of the essence of the contract. This intention must be found in the contract itself, as under the Indian Evidence Act, S. 91, the terms of a contract in writing must be proved by putting the contract itself in evidence. There is nothing in the language of the contract to show that the parties intended that time was to be of the essence of the contract. Fixing the time within which completion was to take does not by itself indicate that the parties intended that time was to be of the

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(1) (1913) I. L. R. 36 Bom. 77 ; 15 Bom. L. R. 405.

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essence of the contract ; nor does the clause fixing time of the payment of the balance of the purchase money and providing for the forfeiture of the deposit in default of payment within the fixed time, show that the parties so intended. It is submitted that time was not of the essence of the contract in this case.

[Viscount Haldane referred to *Stickney v. Keeble* (1)].

In that case it was held that time was not of the essence of the contract, which fixed a date for completion. The rule is that where the contract fixes time within which it is to be performed, it should be performed within the time fixed or within a reasonable time thereafter.

*Leslie Scott, K. C.* and *Raikes* for the Respondent : The case in (1915) A. C. 386 is distinguishable. There the language of the contract was essentially different, and at page 416 Lord Parker of Waddington said that the maxim that in equity the time fixed for completion is not of the essence of the contract, never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties. It will be shown later on that to disregard the time fixed in this case would be to do injustice to the respondent.

[Viscount Haldane referred to *Lennon v. Napper* (2), which is referred to in *Roberts v. Berry* (3), where it was decided that in contracts to sell land the stipulation as to time is differently regarded in Courts of law and equity.]

A Court of equity will hold in three cases that time is of the essence of the contract : (1) where the contract says so ; (2) where the nature of the case makes it so, and (3) where from surrounding circumstances the Court comes to the conclusion that it was the intention of the parties to make time as the essence of the contract : *Inglis v. Buttery* (4). Here, the contract expressly made time as the essence of the contract.

Where the purchaser comes in a Court of equity for specific performance of a contract of sale of land, equity presumes that time is not of the essence of the contract, and it is submitted that the plaintiff is entitled to give evidence to rebut that presumption.

[Lord Wrenbury referred to *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.* (5) as to the jurisdiction of the Court of equity.]

(1) L. R. (1915) A. C. 386.

(2) (1802) 2 Sch. and Lef. 682.

(3) (1853) 3 D. M. & G. 264.

(4) (1878, L. R. 3 App. Cas. 552 (577).

(5) L. R. (1914) A. C. 25.

The Court is entitled to look at the surrounding circumstances to establish the intention of the parties, and to so ascertain the intention extrinsic evidence is admissible: Taylor on Evidence, para. 1227; and *Trimmer v. Bayne* (1). Such evidence was admitted in *Seton v. Slade* (2), and *Roberts v. Berry* (3). Sec. 92 of the Indian Evidence Act codifies in substance the English Common law rule that no evidence will be admitted to vary, add etc. But that section does not apply here as it is contended that the intention of the parties was that time was of the essence of the contract: See also *Nokes v. Lord Kilmercy* (4) and *Tilley v. Thomas* (5). The evidence as to surrounding circumstances also shows that the parties intended that time was to be the essence of the contract.

A clause similar to the one in this case as to forfeiture of deposit, etc., was held as showing the intention of the parties that time was of the essence of the contract, and where the time fixed by the contract was subsequently extended, it was held that such extension did not operate as an absolute waiver of the condition as to the time fixed, but merely substituted the extended period for that originally fixed: *Gedye v. Duke of Montrose* (6); *Hudson v. Temple* (7), and *Barlay v. Messenger* (8). Accordingly, it is submitted that this clause should be construed as showing that the intention of the parties was to make time as of the essence of the contract.

But it is contended on the authority of *Seton v. Slade* (2), that that clause did not show that the parties intended that time was of the essence of the contract: See White and Tudor's Leading Cases 6th, ed., Vol. 2, p. 478, where this case and other English cases bearing on the point are considered. But the law applicable in India is S. 54 of the Transfer of Property Act, and not the rule in *Seton v. Slade* (2). There is no distinction in India between legal and equitable estates: *Webb v. Macpherson* (9). Under the said S. 54 no rights in the property sold pass to a purchaser until the ownership therein passes to him as thereby provided, and under section 108 of the Transfer of Property Act a lessee is liable for a breach of covenant until the assignment of the lease to his assignee is completed. In this case the covenants of the lease were onerous, and the respondent had great anxiety in connection with them. If the time fixed by

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(1) (1802) 7 Ves. 508.

(2) (1802) 7 Ves. 264.

(3) (1853) 3 D. M. &amp; G. 264.

(4) (1847) 1 D. and Sm. 444.

(5) (1867) L. R. 3 Ch. App. Cas. 61 (62 and 70).

(6) (1858) 26 Beav. 45.

(7) (1860) 29 Beav. 536.

(8) (1874) 43 L. J. Ch. 449.

(9) (1903) L. R. 30 I. A. 238 (245); L. L. R. 31 Cal. 57 (72).

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the contract were extended, it would be doing an injustice to the respondent. Whether the contract is voidable depends upon section 55 of the Indian Contract Act, which says that it would be voidable, time being fixed by the contract, if the intention of the parties was that time was of the essence of the contract.

[Mr. Ameer Ali: That provision must be read with the Indian Evidence Act. When a contract is reduced into writing, can you prove the intention of the parties from anything other than the writing itself?]

A contract says that a thing should be done by a certain date and if it is not done by that date, the contract shall be at an end. In such a contract, according to Indian law, time is of the essence.

[Lord Wrenbury: If the stipulation is that the purchase price should be paid by the 1st January, the Court says that it should be paid on that date, or within a reasonable time thereafter. Now, suppose that there is a further condition that if it be not paid on that date, the purchaser is to forfeit his earnest money. This also may mean that if it be not paid on that date or within a reasonable time thereafter. Is there a case where it is decided that under these circumstances time becomes the essence of the contract?]

Yes, see *Hudson v. Bartram* (1). Reference was also made to the Specific Relief Act, sections 12 and 26.

The appellant was not called upon to reply.

The judgment of their Lordships was delivered by

December, 6.

**Viscount Haldane:**—The question in this appeal is whether the appellant, who was the plaintiff in an action for specific performance, is entitled to the relief he has claimed. Macleod, J., decided that he is so entitled, but the High Court in appeal at Bombay reversed the decision and dismissed the action.

The facts may be stated briefly. The Government of Bombay, in 1898, granted to one Mothabai Bhikaji a reclamation lease of over 2,000 acres of land near Bombay for a term of 999 years. The lease provided that the lessee should reclaim the land and bring it under cultivation within a period which was ultimately extended to the year 1910. He was also to maintain the reclamation throughout the term, and keep up certain roads, and make and maintain certain waterways and boundary marks, to the satisfaction of the local Collector. The lessee was, further, not to assign or underlet, until the reclamation was complete, without the consent in writing of the Collector. In case of breach of any covenant or condition, or provision of the lease the lessor had the right to re-enter and determine the

lease. The lease was transferred in 1908 to the respondent, who had purchased it from the lessee.

On the 8th July 1911, the respondent agreed in writing by a document in Gujrati, a translation of which was before their Lordships, to sell the leasehold interest to the appellant for Rs. 85,000, and the appellant paid Rs. 4,000 of this sum as a deposit or earnest. This agreement provided, by clauses 1 and 2, that the title was to be made marketable; that the conveyance was to be prepared and received within two months from the date of the agreement; that on signing the document of sale Rs. 80,500 were to be paid, and after its registration the remaining Rs. 500. The 5th clause provided that on payment of the Rs. 81,000, as provided by clause 2, the document of sale or conveyance was to be executed, but should the purchaser not pay the amount within the fixed period above mentioned he was to have no right to the deposit or earnest money of Rs. 4,000 paid on account, and any claim of his was to be void, and the vendor was, after that date, to be at liberty to resell.

There was a subsidiary agreement that the respondent should buy certain land belonging to the appellant for Rs. 30,000, to be deducted from the Rs. 81,000, but on this nothing turns.

The appellant's solicitors proceeded to investigate the title, and they made requisitions. Of these requisitions some related to the rights of one Chimanlal, who had professed to make a title as heir to his father, one of certain mortgagees of the interest of Mothabai Bhikaji. Another of the requisitions was for a certificate or letter from the Collector stating that all the covenants and conditions of the lease had been performed and fulfilled. This requisition was made on the 3rd October, 1911, more than two months after the date of the contract. The respondent did not comply with these requisitions, but on the 6th October, through his solicitors, asserted a right to put an end to the contract on the ground that time was of its essence, and to forfeit the deposit on the ground that the appellant had failed to complete his purchase within the date fixed.

If these requisitions were made in time their Lordships are of opinion that they were proper, and that they were not adequately answered. If time was not of the essence of the contract it is clear that they were legitimately made, however the matter might stand as to one or other of them if time were of the essence. This last question therefore lies at the root of the controversy, and the answer to it is decisive of the appeal.

The law applicable to the point is contained in section 55 of the

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Indian Contract Act, 1872, which provides that "when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. The principle is well expressed in what Lord Redesdale said in his well-known judgment in *Lennon v. Napper* (1), which was adopted by Knight-Bruce, L.J., in *Roberts v. Berry* (2). The doctrine laid down in these cases was again formulated by Lord Cairns in *Tilley v. Thomas* (3), and by the House of Lords in the recent case of *Stickney v. Keeble* (4). Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in *Tilley v. Thomas* (3) :—

"The construction is and must be in equity, the same as in a Court of law. A Court of equity will indeed relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract; either for completion or for the steps towards completion, if it can do justice between the parties, and if [as Lord Justice Turner said in *Roberts v. Berry* (2)], there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. That is what is meant, and all that is meant, when it is said that in equity, time is not of the essence of the contract. Of the three grounds mentioned by Lord Justice Turner 'express stipulations' requires no comment. 'The nature of the property' is illustrated by the case of reversions, trusts, or trades. The 'surrounding circumstances' must depend on the facts of each particular case."

(1) (1802) 2 Sch. &amp; Lef. 682.

(2) (1852) 3 D. M. &amp; G. 264 (289).

(3) (1878) 3 Ch. App. 61.

(4) (1915) A. C. 386.

Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakeable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of law the contract has not been literally performed by the plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which Courts of equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter.

But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract: *Tilley v. Thomas* (1), where specific performance was refused, illustrates this class of transaction. But in such a case the intention must appear from what has passed prior to the contract, the construction of which cannot be affected in the contemplation of equity by what takes place after it has once been entered into.

Applying these principles to the agreement before them, their Lordships are of opinion that there is nothing in its language or in the subject-matter to displace the presumption that for the purposes of specific performance time was not of the essence of the bargain. They do not think that the subject-matter or

(1) (1878) 3 Ch. App. 61.

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the character of the lease sold were such as to take the case out of the class to which the principle of equity applies. They are also unable to hold that the plaintiff bound himself by his correspondence subsequent to the agreement to a new agreement that time, if it was not originally of the essence, should be made so. As to the language of the agreement itself, without dwelling on a possible point in the plaintiff's favour which does not appear to have been raised in the Court below, that the only time limit mentioned refers to his preparation and reception of the conveyance, as distinguished from completion, they agree with Macleod, J. in the view that there is nothing said in it sufficient to exclude the equitable canon of interpretation. And they agree in his conclusion that the defendant had no justification in claiming in the circumstances to treat time as of the essence. They are unable to concur in the opinion of the learned judges of the High Court in appeal that there was evidence that the plaintiff had not money with which to pay the price, or that the subsequent correspondence and dealings between the parties modified the right of the plaintiff to insist on his right to complete the purchase.

These conclusions render it unnecessary to consider the other points dealt with in the High Court and elaborately argued at their Lordships' bar. The result is that they think that the appeal ought to be allowed and the judgment of Macleod J. restored, and that the respondent should pay the costs of this appeal and in the Courts below. They will humbly advise His Majesty accordingly.

*Letteys and Hart* :—Solicitors for the Appellant.

*T. L. Wilson & Co.* :—Solicitors for the Respondent.

I. M. P.

*Appeal allowed.*

PRESENT :—*Viscount Haldane, Lord Parmoor, Lord Wrenbury,  
Sir John Edge and Mr. Ameer Ali.*

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v.

V. SUBBAMMAL AND ANOTHER.

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*November 3, 17.*

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

*Will*—*Authority to adopt and disposition of property*—*Subsequent will*—*Doctrine of dependent relative revocation*—*Invalid alternative inconsistent disposition*—*Revocation.*

The application of the doctrine of dependent relative revocation is a question of intention which has to be ascertained from the language of the testator as found in his testamentary documents.

An alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property.

*Alexander v. Kirkpartic* (1) approved and followed.

*Tupper v. Tupper* (2); *Quinn v. Butler* (3); and *Baker v. Story* (4) referred to and distinguished.

A., a sole surviving Hindu co-parcener, made a will appointing executors and containing a disposal of his property and an authority to his widow to adopt B., a son of his daughter, and in case of B's death during the widow's lifetime to adopt another of his daughter's sons. The testator adopted B during his lifetime and thereafter made another will containing a new appointment of executors and a gift on B's death in favour of his sons. That will contained no words of revocation of the previous will, was wholly silent as to adoption and did not refer in any way by revocation or otherwise to the clause in the earlier will giving the widow contingent power to adopt. After the testator's death the first will was not and the second was admitted to probate, but subsequently the second will was decreed to be null and void and inoperative according to Hindu law on the ground that the property thereby disposed of was ancestral and at the time of making the will the testator had a co-parcener (his adopted son B.) and could not dispose of it. Thereafter the widow adopted C., another son of the testator's daughter. It was contended that the first document was not a will and that if it was a will, it was revoked by the second will and that at the time of adopting C. no power existed in the widow to make an adoption :

*Held*, affirming the High Court, that the first document which contained an appointment of executors and was executed by a testator who at its date could dispose of the property of which he purported to dispose, was a will; and that assuming that there was such an inconsistency between the two wills as that the provisions of the earlier will could not stand with the existence of the later will, the contention would affect only the part containing a disposal of the property and not the part giving a power to adopt, but that the disposition under the first will was not revoked by the subsequent invalid disposition of the same property under the second will and the contingent power to adopt in the earlier instrument was unaffected by anything in the later.

*Venkatanarayana v. Subbammal* (5) affirmed.

Appeal from a decree of the High Court at Madras (White, C.J., and Nair, J.), dated the 12th, March 1912, affirming a decree of Wallis, J., dated the 26th March, 1909.

The facts of the case are stated in the judgment of their Lordships. The suit giving rise to the appeal was brought by the appellant for a declaration that the adoption by the first respondent of the second respondent was invalid—the ground alleged being that the adoption had not been authorised by the late husband of the first respondent. Both Courts in India had held that the adoption

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(1) (1874) L. R. 2 H. L. Sc. & Div. 397.

(2) (1855) I. K. & J. 665.

(3) (1868) L. R. 6 Eq. 225.

(4) (1874) 31 L. T. N. S. 631; 23 W. R. (Eng.) 147.

(5) (1912) 2 Mad. L. T. 307.

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had been duly authorised, and dismissed the suit. For a report of the judgment of the High Court see *Venkatanarayana Pillai v. Subbammal*. (1)

*Sir Robert Finlay, K. C.* and *Dube*, for the Appellant: The first instrument is in substance a power to adopt, because the property purporting to have been thereby disposed of was ancestral property and the testator had no power of disposition over it and consequently that instrument is not a will within the definition of that term in section 3 of the Indian Succession Act, and is not admissible in evidence for want of registration.

The second instrument is a will, and probate thereof was obtained. Although it was declared invalid as regards the disposition of the ancestral property, it remained operative as regards the other portions thereof. The tenor of this will is that there is no mention of any power to adopt on the death of the son already adopted by the testator. By clause 5 the testator provides that on the death of the adopted son, his issues should enjoy the properties thereby disposed of, and in case the adopted son had no issue, there was provision as to who was to enjoy them. This is quite inconsistent with any intention on the part of the testator that the power to adopt under the first will should be exercised. The second will in effect revokes the power in the first will. *Tupper v. Tupper* (2), *Baker v. Story* (3), and *Quinn v. Butler* (4), were relied on, and *Onions v. Tyrer* (5), and *Alexander v. Kirkpatrick* (6), were distinguished.

The widow, as an executrix under the first will, could not claim to have exercised the power to adopt under it, as that will is not proved: Indian Succession Act, section 157.

The real question is to find the testator's intention from what he himself says, and it is quite clear from the second will that the testator intended that the power to adopt under the first will should not be exercised.

[De Gruyther, K. C.: The first will is valid as the testator had no coparcener at the time when it was made, but the second will was invalid as he had a coparcener in his adopted son and consequently he could not dispose of ancestral property.]

[Mr. Amcer Ali: If that is so, the disposition in the first will is not revoked].

(1) (1912) 2 Mad. L. T. 307.

(2) (1855) 1 K. & J. 665.

(3) (1874) 31 L. T. N. S. 631; 23 W. R. (Eng.) 147.

(4) (1868) L. R. 6 Eq. 225.

(5) (1716) 1 Pere Williams, 342.

(6) (1874) L. R. 2 H. L. Sc. & Div. 397.

That argument has no force, as the first will spoke from date of the testator's death, when the disposition would have been ineffectual as he had at the time an adopted son.

*De Gruyther, K. C. and Brown*, for the respondents, were not called upon.

The judgment of their Lordships was delivered by

**Lord Wrenbury**—At the date of the first testamentary instrument, viz., the 8th September 1889, the testator, Vencatarama was sole surviving coparcener of the property here in question. It was ancestral property, but a division had been effected, and of the testator's divided share he had no coparcener. He could, therefore, dispose of it. Under those circumstances he made a will dated the 8th September 1889, which contained an appointment of his wife and his daughter to be executrices and for the present purpose consisted of two parts, viz. : (1) a disposal of the property in a certain way, and (2) an authority to his widow in a certain event to take a son by adoption.

He had, and it appears by the will that he had, nominated as his son Vencatakrisna, who was a son of his daughter Rajammal, but he had not completed the adoption. By his will he directed that if he should die before completing the adoption, his wife Subbammal should, after his death complete the necessary ceremonies, and take the said grandson in adoption, and his will contained the following clause :—

"In case any danger may happen to my grandson Siranjeevi Vencatakrisna tillay during the lifetime of my wife Subbammal who is one of my executrices my wife Subbammal may according to her wishes take in adoption one of my aforesaid daughter Rajammal's sons, and give my properties to that son."

An argument was tentatively put forward, but was not pressed by the appellant's counsel that this document was not a will. Their Lordships can entertain no doubt that it was a will. It contained an appointment of executors, and (as has already been pointed out) it was executed by a testator who at its date could dispose of the property of which he purported to dispose.

On the 9th February 1890, the testator completed the adoption of Vencatakrisna. Another member of the coparcenary thus entered the joint family, and when the testator subsequently died, the property was ancestral property, of which he was not at that date competent to dispose. In this sense, and to this extent, the will of the 8th September 1889, became ineffectual.

On the 21st March 1890 the testator executed another will. It

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contains a new appointment of executors. They are the two executors appointed by the will of the 8th September 1889, and a third. It discloses on its face that the property of which it purports to dispose is ancestral, but nevertheless purports to dispose of it although at this date the testator had a coparcener, and could not dispose of it. It contains in article (5) a gift that, in case Vencatakrishna shall happen to die at any time, his issues shall enjoy the property. It contains no words of revocation of the previous will; is wholly silent as to adoption; and does not refer in any way by revocation or otherwise to the clause in the will of the 8th September 1889 set out above, which gave the widow a contingent power of adoption.

On the 4th April 1890 the testator died. The will of the 8th September 1889 was not, and the will of the 21st March 1890 was, admitted to probate. On the 4th June 1891, Venkatakrishna died.

In 1893 the plaintiff in the present proceedings being the brother of Vencatarama and thus reversionary heir to Vencatakrishna instituted a suit, and on the 20th November 1894, obtained a decree that the will of the 21st March 1890 was null and void, and inoperative according to Hindu law. This must have meant as regards the disposal of the ancestral property.

In this state of facts the widow Subbammal, on the 13th August 1906, adopted the defendant Parthasarathi.

The present suit is one instituted by Vencatanarayana, as reversionary heir of Vencatakrishna, against Subbammal, the widow, and Parthasarathi, the son adopted by the widow, for a declaration that his adoption was illegal and invalid.

The appellant advanced two contentions (1) that the document of the 8th September 1889 was not a will—with this their Lordships have dealt above—and (2) and that if it was a will, it was revoked by the will of 21st March 1890, and that no power existed in the widow in 1906 to make an adoption.

The appellant rests his case not upon any words in the will of 1889 revoking the will of 1889, for there are none, but upon such an inconsistency between the two wills as that the provisions of the earlier will cannot stand with the existence of the later will. It has already been pointed out that the will of 1889 consists of two parts, and assuming for the moment that the contention is well founded as to the one part, viz., that which effects a disposal of the property, it does not touch the other part, viz., that which gives a power to adopt.

Whether the contention is well founded as regards the other part, viz., that which effects the disposal of the property, turns upon the application of the doctrine of dependent relative revocation. This is really a question of intention. If by his will a testator gives property to A and by a codicil gives the same property to B, and if in the event it turns out that B cannot take, it has to be ascertained from the language of the testator as found in his testamentary documents whether he intended that the gift to A should be displaced altogether or that it should be displaced only in favour of B, and (if B cannot take) the gift to A should remain. If, as in *Tupper v. Tupper* (1), the testator's language is that (a) he revokes the gift to A and (b) in lieu thereof he gives to B, it may well be that there is a revocation for all purposes. If, as in *Quinn v. Butler* (2), the donee of a power to charge does by his will charge with 4,000*l.* to be paid to A and 3,000*l.* to be paid to B, C and D equally, and then by codicil revokes the aggregate charge of 7,000*l.* made by his will and charges with 7,000*l.* for A., the charge in the will is no doubt gone for all purposes. If, as in *Baker v. Story* (3) A takes absolutely under the will, but under the codicil takes for life only with a gift over which fails, and there is an ultimate effectual residuary gift, it is difficult to find any room for a contention that the gift by will is not gone altogether. But no one of these authorities is pertinent to the present case. *Alexander v. Kirkpatrick* (4), although a case upon two dispositions of which the former contained a power of revocation, and not upon two wills, contains a principle applicable in their Lordships' opinion to the present case, viz., that an alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property.

It is admitted that by the will of 1890 the testator could not give his ancestral properties as he purported to do, but it is argued that from the fact that he purported so to give them there is to be inferred an intention that if he could not give them as he purported to do in 1890 his disposition in 1889 should nevertheless be revoked—and the argument goes beyond this to affirm that not only his disposition of property in 1889 but also the independent provision conferring a power to adopt given in 1889 is in like manner revoked. Their Lordships do not accept either argument as well founded. The effect of that which has taken place is that there are two testamentary instruments. The later must no doubt prevail

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(1) (1855) 1 K. &amp; J. 665.

(2) (1868) L. R. 6 Eq. 225.

(3) (1874) 31 L. T. N. S. 631; 23 W. R. (Eng.) 147.

(4) (1874) L. R. 2 H. L. Sc. Div. 397.

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over the earlier, but the contingent power to adopt in the earlier instrument is unaffected by anything in the later. In their judgment it has been rightly held that on the 13th August 1906, the widow had the power of adoption which she exercised, and the plaintiff's case fails.

Their Lordships will humbly advise His Majesty that the appeal fails and must be dismissed with costs.

*John Jasselyn* :—Solicitor for the Appellant.

*Douglas Grant* :—Attorney for the Respondents.

J. M. P.

*Appeal dismissed.*

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.*

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January, 4, 5, 6, 1903

GANGADHAR BAGLA

v.

HIRA LAL BAGLA.\*

*Stridhan—Succession—Mitakshara school—Step-son—Adopted son of another wife—Dying without progeny—Special text, construction of.*

*Per Curiam* : When a Hindu widow, governed by the Mitakshara school of law, dies without issue or progeny, and leaves stridhan property, her estate devolves on the sapindas of her deceased husband in accordance with paragraph 25 read with paragraphs 9 and 11 of Chap. II, Sec. XI of the Mitakshara. An adopted son of her husband taken in conjunction with another wife, and a son of her husband born of the womb of a third wife are sapindas of their deceased father in the same degree ; consequently, they inherit the estate of their step-mother, in equal shares.

*Per Mookerjee, J.* : A special text or statute forming an exception to a general text or statute should be construed strictly and applied only to cases falling clearly within it.

Appeal by the Defendant.

Suit for a declaration that the plaintiff and the defendant were entitled in equal shares to the property of their step-mother.

The material facts appear from the judgment of Chitty, J., which is as follows :

**Chitty, J.**—This is a suit filed by Hira Lal Bagla against his brother Gangadhar Bagla for a declaration that the brothers are

\* Appeal from Original Decree No. 18 of 1915, against the decree of Mr. Justice Chitty, sitting on the Original Side, dated the 1st December, 1914.

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entitled to share equally in the estate of Rani Mohori Bibee, widow of their father Raja Shewbux Bagla ; for administration of the estate by the Court ; and for other relief. Mirza Mull and Raja Shewbux Bagla were brothers, members of a joint Hindu family, governed by the Mitakshara School of Hindu Law. Mirza Mull died leaving a widow, Dhuni Bibee and a son Ballav Das. Ballav Das and his wife Bhugwandai both died shortly after Mirza Mull. The plaintiff had been adopted by Raja Shewbux Bagla and his first wife Soli Bibee. Soli died and Raja Shewbux married Moni Bibee, by whom he had a son, the defendant Gangadhar. Moni died and Raja Shewbux married Sundar Bibee, by whom he had a daughter Fulbai. Sunder died and he married a fourth wife Mohori Bibee. Raja Shewbux Bagla, his two sons, his wife Mohori Bibee, and Dhuni Bibee, widow of Mirza Mull in 1907 submitted their family disputes to the arbitration of Hardatrai Praladka and Ramniranjan Das Murarka, who made their award on 15th September 1907. That award was filed in and became a decree of this Court, inspite of the opposition of Mohori Bibee.

Raja Shewbux Bagla died leaving a will, by which he left his property to Mohori Bibee for her life and after her death to the defendant Gangadhar.

Mohori Bibee died intestate on 5th June 1900, leaving property of considerable value consisting principally of jewellery. A box containing such jewellery is, I am told, now in the custody of the National Bank of India.

The following issues were raised :—

1. Were the ornaments claimed in the plaint the separate stridhan property of Mohori Bibee or did they belong to Raja Shewbux Bagla ?
2. Are the ornaments, items, 1-14 in the list to the award, the debutter property of Shatanarain Jew ?
3. Is the plaintiff estopped from claiming as an heir of Mohori Bibee ?
4. Is the plaintiff estopped from claiming the jewellery in suit as against the defendant by reason of the award, dated 15th September 1907 ?
5. Is the plaintiff an heir of Mohori Bibee ?
6. If so, to what shares in her estate would the plaintiff and defendant be respectively entitled ?
7. Whether, if plaintiff is entitled to participate in the inheritance he is not bound to contribute to the expenses of the sradh of Mohori Bibee and the payment of her debts.

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It is unnecessary to discuss the first two issues. They will be investigated in the inquiry as to the estate of Mohori Bibee. I may however mention that it was stated at the Bar that there is now no question as to which of the ornaments were debutter. Such as were dedicated to the idol have already been handed over for that purpose.

The answer to issue 7 is obvious. In the administration of Mohori Bibee's estate her funeral and sradh expenses and debts will have to be taken into account. If the defendant has properly expended money for those purposes he will be entitled to be recouped by the plaintiff *pro rata* out of the share, if any, allotted to him.

As to issues 3 and 4, no question of estoppel really arises, and the point was not seriously pressed by counsel for the defendant though it was not expressly abandoned. The adoption of Hira Lal to Raja Shewbux Bagla and his wife Soli Bibi is admitted. It was suggested that Hira Lal had been subsequently taken in adoption to Mirza Mull and that he could not be allowed now to claim as the son of Raja Shewbux Bagla. It is clear from the submission to arbitration and from the recitals to the award that this was not the case. At that time, 1907, Hira Lal was regarded as a son of Raja Shewbux Bagla and the arbitration and award proceeded on that footing. The fact of his adoption to Mirza Mull is expressly negatived by the recitals to the award, and the property was divided, on a partition between Raja Shewbux Bagla and his two sons. The shares would have been different, had Hira Lal been regarded as Mirza Mull's son. Hira Lal certainly did not take up that position. I find these two issues in favour of the plaintiff and against the defendant. The substantial question in this suit is that raised by the 5th and 6th issues, whether the plaintiff is an heir of Mohori Bibee and if so in what shares do he and the defendant divide her estate. For the defendant it was contended (1) that the plaintiff being only the adopted son of one wife had no right of inheritance to a rival wife's stridhan as against a son subsequently born of a third wife and (2) that if he is an heir then he takes only  $\frac{1}{4}$ th of what the legitimate son takes, in other words,  $\frac{1}{4}$ th of the step-mother's estate.

For the plaintiff it was conceded that in succession to a father or to paternal relatives by the law of the Mitakshara the adopted son would take a  $\frac{1}{4}$ th share and the subsequently born legitimate son a  $\frac{1}{4}$ th share of the estate. But it was contended that that is a special rule affecting that kind of succession, and that in the absence of any special rule applicable to the present case, the ordinary rule

would apply and the adopted and legitimate sons would take in equal shares.

A number of texts, commentaries, and decided cases were referred to and the matter was fully argued on both sides. I have carefully considered the materials placed before me, but do not think that any useful purpose will be served by an elaborate discussion. The matter lies in a narrow compass and it will be sufficient if I briefly indicate the conclusion at which I have arrived.

The first contention raised on behalf of the defendant is unsupported, so far as I can see, by any authority, and moreover appears to be diametrically opposed to those decisions which say that as regards inheritance an adopted son is in all respects on an equality with the legitimate son except where such rights are expressly denied to him. I hold therefore that the plaintiff is entitled with Gangadhar to succeed to the estate of Mohori Bibee.

With regard to their shares in the inheritance, it is no doubt true that in succession to the estate of a father or a father's relatives the adopted son takes a lesser share than the legitimate son. But this is in consequence of express texts to that effect, and is one of the exceptions to the general rule referred to in the decisions. There is no decision so far as I am aware which deals with the precise question of inheritance arising here, but there is a series of decisions laying down in general terms the equal rights of the adopted and legitimate son in all matters of inheritance, except where there is an express authority limiting those rights. It is not suggested that there is any text limiting the right of an adopted son to share equally with his legitimate brother in the succession to the *stridhan* of their step-mother. I need only refer to the cases of *Treencowree v. Dinonath* (1); *Kalikomal v. Uma Sunker* (2); affirming the decision of a Full Bench of this Court *Uma Sunker v. Kali Komul* (3) reported at 6 Calc. 256; and *Padmakumari v. Court of Wards* (4).

Against these decisions, and the principle underlying them, the defendant's counsel has not been able to cite a single case.

I accordingly hold that the plaintiff and defendant are entitled to succeed to the estate of Mohori Bibee in equal shares.

There will be the usual decree for administration of her estate with the necessary directions and enquiries. The defendant must pay to the plaintiff the costs of the second and third day's hearing before me, which have been occasioned by the contention raised by

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(1) (1865) 3 W. R. 24.

(2) (1883) I. L. R. 10 Calc. 232 P. C.

(3) (1880) I. L. R. 6 Calc. 256 F. B.

(4) (1881) I. L. R. 8 Calc. 302.

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the defendant, in which he has failed. Further consideration and other costs of the suit will be reserved. Liberty to apply.

Against this decision, the defendant appealed.

*Messrs. B. Chakravarty, A. N. Chowdhury and B. K. Lahiri* for the Appellant.

*Messrs. B. C. Mitter and B. L. Mitter* for the Respondent.

C. A. V.

January, 19.

**Sanderson, C. J.**—This is a suit by Hira Lal Bagla against his brother Gangadhar Bagla in which the plaintiff asks for a declaration that he and the defendant are entitled in equal shares to the property of Rani Mohori Bibee a widow who had been the fourth wife of Rajah Sewbux Bagla : for administration and partition of Mohori Bibee's estate and other incidental relief. The case raises the question whether the plaintiff, who was the adopted son of Rajah Sewbux Bagla and his first wife, is entitled to any (and if so what) share of the stridhan property of Rajah Sewbux Bagla's fourth wife in competition with the defendant who was the son of Rajah and his second wife.

The details of the family tree are given in the judgment of Chitty, J., and I need not repeat them ; the only point which I need emphasize being that the fourth wife, whose property is in question, died without issue. It appears that a box of jewellery, alleged to be valuable, which had been deposited in a Bank by Mohori Bibee, constituted the main part of her estate. It was, however, alleged by the plaintiff, though denied by the defendant, that there was other property belonging to Mohori Bibee besides the jewellery, viz., certain Hundies.

The first of the issues raised, was as follows :—Were the ornaments claimed in the plaint the separate stridhan property of Mohori Bibee, or did they belong to Rajah Sewbux Bagla ?

This issue has not yet been decided, and the result may be that if on the enquiry, which must be held hereafter, it turns out that the jewels in question were the property of the Rajah and were not the separate stridhan of Mohori Bibee, the above-mentioned question would not arise : for the jewels would pass under the Rajah's will to the defendant, and if there were no other property of Mohori Bibee besides the jewellery, then the discussion which we have had would become merely *academical*.

It was not until some considerable time had been occupied in argument that the true position became clear to the Court, otherwise, personally, I should have been in favour of postponing

the decision of this case until the above-mentioned enquiry had been held.

But in view of the fact that considerable time had already been spent over the case, and that in one event the point will be material, we come to the conclusion that in the interest of the parties it would be best for us to give a decision at once.

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It is agreed that the family were governed by the Mitakshara school of Hindu law, but the learned counsel for the defendant urged that the Mitakshara was uncertain or doubtful on the point in question and relied upon a passage in Manu—on the other hand it was argued for the plaintiff that the provisions of the Mitakshara were clear and admitted of no doubt. The Mitakshara in chapter II, section XI, paragraph 9, provides as follows :—“if a woman die ‘without issue,’ that is, leaving no progeny, in other words, having no daughter, nor daughter’s daughter, nor daughter’s son, nor son, nor son’s son, the woman’s property, as above described, shall be taken by her kinsmen, namely her husband and the rest, as will be (forthwith) explained.” Paragraph 2 contains further provisions as to the succession of a woman dying without issue having regard to the different forms of marriage. This marriage, it was agreed, must be taken to be governed by one of the first named four modes in which event the whole property of a woman dying without issue as before stated belongs in the first place to her husband : on failure of his it goes to his nearest kinsmen (sapindas). This is confirmed by paragraph 25.

It was argued, however, on behalf of the defendant that these paragraphs do not apply to this case, because it was said that Mohori Bibee was not a woman who died without issue, and reliance is placed upon the text of Manu, which says that “If among the wives of the same man one becomes mother of a son,” Manu says, “that by that son all of them become mothers of male children,” and inasmuch as Rajah Sewbux’s second wife had a son, viz, the defendant, Mohori Bibee his fourth wife became a mother of male issue, and, therefore, did not die without issue. In other words the learned counsel’s first and main point was that the defendant succeeded as the direct issue of Mohori Bibee, and that the plaintiff, being merely an adopted son, did not take a share.

In my judgment this argument ought not to prevail.

Even if the text in Manu has reference to questions of inheritance, as to which there seems considerable doubt—see *A. Nachiar*

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*v. Forbes* (1), and *Bhimacharya v. Ramacharya* (2),—in my judgment the provisions in the paragraphs in the Mitakshara, to which I have referred, are not uncertain or doubtful and they govern this case. An examination of the provisions of these sections of the Mitakshara convinces me that the paragraphs, which are material to this case, viz., 9 and 11, refer to the case of a woman dying without issue in the ordinary meaning of the words, and that the fiction created by the above-mentioned text in Manu does not exclude the case from these provisions.

Applying, therefore, the rules there laid down, the property of Mohori Bibee on her death would have belonged to her husband if he had been alive; but "on failure of him, it goes to his nearest kinsmen sapindas."

Both the plaintiff and defendant are sapindas of their father, but it was contended on behalf of the defendant that he was the nearest sapinda, and was superior to the plaintiff who was merely an adopted son. With this I do not agree: With respect to this matter I think that the rights of the plaintiff, the adopted son, are similar to those of the defendant, the natural born son—[see *Joy Kishore Chowdhry v. Panchoo Baboo* (3), *Padma Coomari Debi v. Court of Wards* (4)] and that they both share in the property of Mohori Bibee as Sapindas of their father.

The next point taken on behalf of the defendant was that even if both the plaintiff and defendant came in as sapindas of their father, the rule which is applicable in certain cases, viz., that the adopted son takes one-fifth only, should be applied to this case, which is one of competition between a real and an adopted son. The rule upon such a point as this has been laid down by the Privy Council in *Padma Coomari Debi v. Court of Wards* (4), as follows—An adopted son occupies the same position in the family of the adopter as a natural born son except in a few instances which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa.

Now there has been no text produced which exactly covers the case in question, but the learned counsel for the defendant relies on a passage in Mr. Sastri's Hindu Law, 4th Ed., p. 171, which refers to the Dattaka Chandrika. This authority apparently extends the above-mentioned rule to cases of partition between male descendants

(1) (1899) L. R. 26 I. A. 246 (253).

(2) (1909) I. L. R. 33 Bom. 452 (460, 461).

(3) (1879) 4 C. L. R. 538.

(4) (1881) L. R. 8 I. A. 229 (246).

in the male line down to the great grandson where there is competition between an adopted and real descendant, and he arrives at that result by way of an analogy which might cover all cases in which there is such competition.

In my judgment, however, the proper course to adopt is to apply the rule laid down by this Court in the above-mentioned case (1), and in the above-mentioned Privy Council decision (2), viz., that the rights of an adopted son, unless curtailed by express texts, are in every respect similar to those of a natural son, and as there is no express text curtailing the rights of an adopted son who, like the plaintiff in this case, is claiming succession to a share of the property of his adopting father's fourth wife, in my judgment, the plaintiff is entitled to share equally with the defendant.

Since this judgment was written my attention has been drawn to the decision of the Privy Council in *Nagindas Bhugwandas v. Bachoo Hurkissendas* (3), which was given on the 26th November, 1915, and the report of which has only recently reached this country. On the points which are material to this case, it confirms the conclusions I had arrived at.

As to the argument of estoppel which was raised but not strongly urged, there is nothing in the submission to arbitration or the award which, in my judgment, prevents the plaintiff from making the claim in this case.

Finally the learned counsel for the defendant asked that the question whether Mohori Bibee had any property of her own should be tried by a learned Judge on the Original Side, and intimated that he would take this issue at the defendant's risk.

In my judgment it is desirable that this issue should be disposed of as soon as possible : if decided in one way, it will dispose of the whole case and this may save the parties further expense, and the best way of getting a decision on this issue will be to refer it for trial to a Judge on the Original Side.

This appeal will be dismissed with costs. The costs of the issue to be tried will be in the discretion of the learned Judge who tries it.

**Woodroffe, J.**—I am of opinion that the text of Manu, according to which the son of a man by one of his wives is as a son to all his wives who are thus all mothers, does not operate for the purpose of determining the succession so as to make the appellant issue of Sreemutty Mohori Bibee. In my opinion the appellant is not entitled to claim as the son of that lady. It is unnecessary

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(1) (1879) 4 C. L. R. 538.

(2) (1881) L. R. 8 I. A. 229.

(3) (1915) Since reported in 30 M. L. J. 193.

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then to consider whether this text should be construed to include also the plaintiff Hira Lal who was an adopted son of Rajah Sewbux Bagla through his wife Soli Bibee as well as Gangadhar his natural son through his second wife Mohori Bibee (?). But if the text were to be held applicable to establish the appellant's contention that he by a fiction takes as son of the deceased which in fact he was not, then as neither the one nor the other are sons of Mohori Bibee in the natural sense of that term, I should in that case have seen no sufficient ground for distinguishing between the positions of the plaintiff and the defendant, and both plaintiff and defendant would be heirs in equal shares. As however pointed out by Chandavarkar J. (1) the text of Manu on which learned counsel for the appellant relies has been explained in such a way as to imply that its application is of a limited character having no *necessary* reference to questions of inheritance. There are difficulties in applying that text in the way suggested by the appellant which the judgment of my brother Mookerjee explains. In my opinion according to the Mitakshara text both the appellant and respondent succeed to the stridhan of their step-mother as the sapindas of their father her husband, and the appellant does not come in as issue as he contends. For Hira Lal as the adopted son of Soli Bibee is the step-son of the deceased just as Gangadhar is. The question then arises whether, if both the plaintiff and defendant are entitled to claim as sapindas of their father, in what shares do they take. For the appellant it is argued that in that case the plaintiff as adopted son is only entitled to one-fourth which, according to the decision of this Court, is one-fourth of that which the defendant gets or one-fifth to his four-fifth. The natural justice of the case favours equality of division, for Hira Lal on being adopted ceased to belong to his natural family and should not in the absence of any provision to that effect suffer by reason of the birth of natural sons to the father by other wives than she who was associated in such adoption. Though in succession to the estate of a father the adopted son takes a lesser share than the natural born son, no authority has been cited which directly establishes such a rule in the present case of inheritance to stridhan where neither plaintiff nor defendant are the natural or adopted sons of the lady whose property is claimed and where no natural reason exists for distinguishing between their respective cases. On the other hand both are sapindas, and as regards this sapinda relationship there is no difference between an adoptive and natural

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son. The adoptive son is his father's sapinda as the natural son is. Both are then entitled as sapindas of their father, the deceased's husband. There is no competition between them unless (as is not the case) there is any text which establishes a preferential claim in favour of the adoptive son. As against this there is authority in favour of holding that the adoptive son in general occupies the same position as a natural son. Thus in *Joy Kishore v. Panchoo* (1) it was held that the rights of an adopted son, unless contracted by express texts, are in every respect similar to those of a natural born son. There is, therefore, in my opinion no ground for disturbing the decision of Chitty, J. on this point. But in the absence of any special rule affecting the kind of succession before us, the plaintiff and defendant or adoptive and natural step-sons of the deceased should take in equal shares. I hold therefore upon the fifth and sixth issues that plaintiff is an heir of Mohori Bibee and that he is entitled to an equal share in her estate (whatever it may be) with the defendant.

What that estate is and in particular whether the ornaments claimed in the plaint were in fact stridhan property of the deceased to which the above findings apply, is not here decided for the facts are not before us nor any finding thereon. Mr. Chuckerbutty for the appellant has contended that the deceased had no estate which the Court can administer and that he should have been permitted to lead evidence as to this at the time so that an administration account might have been avoided. On the other hand it is contended that the defendant has admitted that there is some estate, and therefore the question what that estate is will be determined under the preliminary administration decree. I think that this matter should have been determined at the trial, for if it turned out that there was no property of the deceased the suit would have been dismissed, and if the amount of the estate had been shown to be trivial, the plaintiff might not have elected to take an administration decree. The Court should therefore first determine whether there is any estate of Sreemutty Mohori Bibee and only in the event of its finding in the affirmative make an administration decree. As regards issues 3 and 4 the estoppel alleged is not in my opinion established, and no question has arisen in this appeal as to the learned Judge's finding on the last or seventh issue. This disposes of all the issues raised. In my opinion the appeal fails and should be dismissed with costs.

**Mookerjee, J.**—This appeal involves an important question of



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Hindu law of first impression, which may be formulated in these terms. A Hindu lady, governed by the Mitakshara school of law, dies possessed of stridhan property ; the rival claimants to her estate are, respectively, an adopted son of her husband taken in conjunction with another wife, and a son of her husband born of the womb of a third wife ; is the latter the preferential heir in competition with the former, or do they both succeed by right of inheritance ; if so, do they take in equal or in unequal shares ? This question has arisen in connection with the estate alleged to have been left by Rani Mohori Bibi, the widow of Raja Sheobux Bagla of this city. The Raja successively took four wives. He had no son by his first wife and consequently took a son in adoption in conjunction with her ; that son is the plaintiff in these proceedings and is the respondent before us. After the death of his first wife, the Raja took a second wife, by whom he had a son, the defendant in these proceedings and appellant before us. After the death of the second wife, the Raja took a third wife by whom he had a daughter ; we are not concerned with her in these proceedings. After the death of the third wife, the Raja took Mohori Bibi as his fourth wife ; the Raja subsequently died on the 5th October, 1908, and about two years later, the Rani died on the 5th June, 1910. The appellant claims her whole estate as her sole heir, and contends, in the alternative, that he is entitled to at least a four-fifths share thereof. The respondent asserts, on the other hand, that he is entitled to a half-share of the estate left by the co-wife of his adoptive mother. Mr. Justice Chitty has upheld this contention. The defendant has reiterated in this Court the objections unsuccessfully urged on his behalf before the trial Judge, and his claim has been sought to be sustained by reference to texts of Manu [IX. 183] and Yajnavalkya [II. 117, 145]. Indeed, no reference was made to the Mitakshara by the counsel for the appellant till his attention was drawn thereto by the Court. It is, consequently, desirable to emphasise the cardinal rule enunciated by Sir James Colville in *Collector of Madura v. Moottoo Ramalinga* (1) namely, that the duty of an European Judge who is under the obligation to administer Hindu law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage, for, under the Hindu system of law, clear proof of usage will outweigh the written text of the law. The parties to this litigation are admittedly

(1) (1868) 12 M. I. A. 397 (436); 1 B. L. R. P. C. 1.

governed by the Beneras school of the Mitakshara law, and we must consequently turn in the first place to the Mitakshara, which, in the words of Sir James Colvile, is universally accepted by all the schools, except that of Bengal, as of the highest authority and which, in Bengal, is received also as of high authority, yielding only to the Dayabhaga in those points where they differ.

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Section XI of the second chapter of the Mitakshara, as translated by Colebrooke, treats of the separate property of a woman. The first eight paragraphs embody an exposition of the nature of stridhan. The author next propounds the distribution of stridhan on the basis of the text of Yajnavalkya (II. 145) "her kinsmen take it, if she die without issue." Paragraph 9 lays down that if a woman die without issue, that is, leaving no progeny, that is leaving no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property shall be taken by her kinsmen, namely, "*her* husband and the rest." Paragraphs 10 and 11 distinguish different heirs according to the diversity of the marriage ceremonies; it is then laid down that in any of the four approved modes of marriage, the property belongs, in the first place, to her husband; on failure of him, it goes to *his* nearest kinsmen (sapindas). Vijnaneswara then proceeds, in paragraph 12, to consider the case of the woman who leaves progeny, i.e., has issue, and, in the six following paragraphs, defines the order of succession of daughters and their descendants. We next come to paragraph 19: "if there be no grandsons in the female line, sons take the property: for it has been already declared 'the male issue succeeds in their default' [Yajnavalkya II. 118]. Manu [IX. 192] likewise shows the right of sons as well as of daughters to their mother's effects: 'when the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate.'" Paragraph 20 interprets this to mean that brothers and sisters do not succeed together, but that one class excludes the other. Paragraph 21 follows with an explicit statement that the whole blood is mentioned to exclude the half-blood. Paragraphs 22 and 23 deal with the exceptional case of the daughter of a rival wife of a superior class, who takes the property of a childless step-mother of an inferior class. Paragraph 24 treats of grandsons who, on failure of sons, inherit the wealth of their paternal grandmother. Paragraph 25 then lays down that, on failure of grandsons also, the husband and other relatives succeed, and thus brings us back to the rule formulated in paragraph 9. The question consequently arises, whether the lady, whose estate forms the subject of controversy, died "without issue" within the meaning of para-

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graph 9, or "left progeny" within the meaning of paragraph 12. The appellant maintains the latter alternative, and in support of of his contention relies upon the text of Manu (IX. 183): "if among all the wives of one husband, one has a son, Manu declares them all to be mothers of male children through that son." The argument is founded on this text that if one of the several wives of a person gives birth to a son, all the wives become the mothers of such son, who thereupon becomes entitled to succeed by inheritance to the wealth of all the wives of his father, as if he were their son within the meaning of the text of the Mitakshara. In my opinion, this process of reasoning is based on a manifest misapplication of the text of Manu. Kulluka Bhatta and Raghavananda, two of the commentators of Manu, (Mandalik's Ed. p. 1208) explain the purpose of this text; the former points out that an adoption by the childless wife is excluded in such a case; the latter observes that this excludes levirate. This is also the view taken by Sarvajnanarayana, another commentator of Manu. In this view, it is needless to consider whether the term *ग्रन्थिणी* in the text of Manu means *ग्रीवग्रन्थिणी* (mother of a naturally born son) as the commentator Nandana interprets it. It is sufficient for our present purpose to note that texts of the same import are found in other Institutes, which indicate that this fiction had a very restricted application. Thus, Vishnu (XV. 41) ordains that "amongst wives of one husband also, the son of one is the son of all"; this is asserted to show that such son must present funeral oblations to all the wives of his father after their death. (S. B. E. Vol. VII page 65). To the same effect is the ordinance of Vashistha (XVII, 11): "if among many wives of one husband, one have a son, they all have offspring through that son; thus says the Veda." This has no reference to the right of succession of the son to the wealth of the wives of his father (S. B. E. Vol. XIV, page 85). The context where the text mentioned occurs in Manu makes it reasonably plain that it has no reference to the question now under consideration. The text which immediately precedes declares as follows: "If among brothers, sprung from one father, one have a son, Manu has declared them all to have male offspring through that son". This is quoted in the Mitakshara (Chapter I, Sec. 11, paragraph 36) and is explained by Vijnaneswar as intended to forbid the adoption of others, if a brother's son can possibly be adopted, but not intended to declare him as the son of his uncle. It may be observed here parenthetically that the Judicial Committee have ruled that not only does not this text invalidate an adoption

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in such circumstances, but that all texts which prescribe the preferential adoption of the son of a brother of a whole blood are merely binding upon the consciences of pious Hindus and do not possess the imperative force of laws; *Uma Deyi v. Gokulananda* (1). I feel no doubt that a similarly restricted interpretation should be adopted in the case of the text whereon the appellant relies, and this view is plainly indicated by the Judicial Committee in *Annapurni v. Forbes* (2), where this very text of Manu is quoted and its scope and purpose explained as follows: "we must suppose that all take the spiritual benefits of male issue; but the law is clear that for the purposes of inheritance, the natural mothers and fathers respectively are preferred." If the contention of the appellant were to prevail, whenever a son is born of the womb of one of the wives of a person, all his wives would stand in the position of mothers to the boy and would be entitled to succeed to him equally by right of inheritance; for it would be obviously illogical to hold that the ladies become his mothers, but he does not become their son. Yet it was ruled by a Full Bench of this Court in *Lala Joti Lal v. Durani Kower* (3), that, according to the Mitakshara, in a divided family, a step-mother cannot succeed to the estate of her step-son; and this exposition of the law has been accepted as correct for over half a century. Further, it is plain that the argument of the appellant involves an *Atideca* upon an *Atideca*, that is, a fiction upon a fiction, or a remote analogy on a remote analogy; the adopted son would by a fiction be a real son of the adopter, and, then, by another fiction, a real son, not only of the adoptive mother, but of all the other wives of the adoptive father; a train of reasoning most repugnant to a Hindu jurist. We may also add that the contention of the appellant is not supported by the decisions in *Manilal v. Rewa* (4); *Mahadev v. Bayaji* (5) and *Bai Keshar Bai v. Hansraj* (6), where a co-widow was preferred to the husband's brother and husband's brother's son as heiress to the stridhan of a Hindu widow who had died without issue; nor is assistance derived from *Bachha v. Jugmon* (7), where under the Mithila law, the husband's brother's son was preferred to the sister's son. We have been pressed, however,

(1) (1878) L. R. 5 I. A. 40; I. L. R. 3 Calc. 587.

(2) (1899) L. R. 26 I. A. 246 (253); I. L. R. 23 Mad. 1.

(3) (1864) B. L. R. F. B. 67; W. R. F. B. 173.

(4) (1892) I. L. R. 17 Bom. 758.

(5) (1893) I. L. R. 19 Bom. 239.

(6) (1906) L. R. 33 I. A. 176; I. L. R. 30 Bom. 431; 4 C. L. J. 9.

(7) (1885) I. L. R. 12 Calc. 348.

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erroneous. There is thus plain indication that even in archaic times, the rule was deemed harsh, and an endeavour was made to restrict its operation. Consequently we should not extend its application to cases not only not comprised strictly within its letter, but undoubtedly beyond its true spirit; in this connection we may bear in mind that Hindu jurists, quite as much as English jurists [*Ebbs v. Boulnois* (1); Co. Litt. 299a] recognize the well-known canon of interpretation that a special text or statute forming an exception to a general text or statute should be construed strictly and applied only to the cases falling clearly within it; the Mitakshara itself recognises the principle that where an exception exists to a general rule, the exception should be confined within the strictest limits so as not to encroach unduly upon the general rule: *Gangu v. Chandra* (2); *Anandi v. Hari* (3); Dattaka Chandrika, Sec. V, 27. Mitakshara on Prayaschitta, Ed., Moghe, p. 292; यावत्कालं धेने अनपत्ति-प्रश्नो न भवति तावत्कालं धेनौ यम्. That the rule is not of universal application is clear from the decision in *Surjokant v. Mohesh* (4), where an adopted son of one daughter and the legitimate son of another daughter were held to be equal sharers in the estate of their maternal grandfather. The only case where the rule has been applied, though it is not covered expressly by the text of Vasistha, is *Raghubanund v. Sadhu* (5), where partition was sought amongst the members of a joint Mitakshara family composed of the adopted son of one brother and the legitimate sons of two other brothers. The correctness of this decision which is in conflict with *Tara Mohun v. Kripa Moyee* (6) and *Dinonath v. Gopal Churn* (7) was doubted in *Baramanund v. Krishna Charan* (8), *Birbhadra v. Kalpataru* (9) and *Raja v. Subbaraya* (10). It was however recently followed by the Bombay High Court in *Bachoo v. Nagindas* (11). On appeal to the Privy Council, the decision of the Bombay High Court has been reversed and the view adopted by this Court in *Raghubanund v. Sadhu* (5) definitely overruled by a judgment which has been received in this country since the present judgment was composed. [*Nagindas v. Bachoo* (12) decided by the Judicial Committee on the 26th November, 1915]. The position, then, is

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| (1) (1875) L. R. 10 Ch. App. 479 (484).          | (2) (1907) I. L. R. 32 Bom. 275. |
| (3) (1909) I. L. R. 33 Bom. 404.                 | (4) (1882) I. L. R. 9 Calc. 70.  |
| (5) (1878) I. L. R. 4 Calc. 425.                 | (6) (1868) 9 W. R. 423.          |
| (7) (1881) 8 C. L. R. 57; (1881) 9 C. L. R. 379. |                                  |
| (8) (1884) 14 C. L. J. 183.                      | (9) (1905) 1 C. L. J. 388.       |
| (10) (1883) I. L. R. 7 Mad. 253.                 | (11) (1914) 16 Bom. L. R. 263.   |
| (12) (1915) Since reported in 30 M. L. J. 193.   |                                  |

that there is neither authority nor principle which can be successfully invoked by the appellant in support of his contention that the estate of his step-mother should be unequally divided as between himself (the real son of his father) and the respondent (the adopted son of his father). We are consequently thrown back upon the fundamental position recognised in a long series of decisions that the adopted son becomes for all purposes the son of the father by adoption and occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined in the Dattaka Chandrika and the Dattaka Mimansa: *Sumboochunder v. Naraini* (1); *Padma Coomari v. Court of Wards* (2); *Kalikamal v. Umasankar* (3); *Umasunker v. Kali Komul* (4); *Joy Kishore v. Panchoo Baboo* (5); *Anandi v. Hari Suba* (6); *Juggurnath v. Mukhun* (7); *Teencowree v. Dinonath* (8); *Radha Prosad v. Rani Moni* (9); *Narusammal v. Balarama* (10); *Annappurni v. Collector* (11). The only point for consideration then is whether there is any text applicable to the present case which reduces the share of the adopted son. I have not been able to trace any text expressly applicable nor can I find any which even by implication supports the contention of the appellant. I am not unmindful that in chapter II, section XI, paragraph 9 of the Mitakshara the property goes to the kinsmen of the woman, namely, *her* husband and the rest and in paragraph 11, on the failure of the husband, it goes to *his* sapindas. In my opinion, this does not show that the property descends as if it belonged to the husband; the only effect of the two paragraphs is to determine the heir to the woman by application of the test of sapindaship with her husband. It follows accordingly that the respondent takes the same share in the estate of her step-mother as he would have done if he had been a real and not the adopted son of his father. I hold finally that Mr. Justice Chitty correctly decided both the points in the case.

As regards the question of estoppel there is nothing in the arbitration proceedings which debars the respondent from contest-

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(1) (1835) 3 Knapp. 55.

(2) (1881) I. L. R. 8 I. A. 229; I. L. R. 8 Calc. 302.

(3) (1883) L. R. 10 I. A. 138; I. L. R. 10 Calc. 232.

(4) (1880) I. L. R. 6 Calc. 256.

(5) (1879) 4 C. L. R. 538.

(6) (1909) I. L. R. 33 Bom. 404.

(7) (1865) 3 W. R. 24.

(8) (1865) 3 W. R. 49.

(9) (1906) 3 C. L. J. 502; I. L. R. 33 Calc. 947.

(10) (1853) 1 M. L. H. C. R. 420.

(11) (1895) I. L. R. 18 M. L. 277 (281).

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ing the claim of the appellant and the point, which indeed was not seriously pressed, does not require elaborate investigation.

I agree with the Chief Justice and Mr. Justice Woodroffe in the directions they propose to give with regard to the costs and the further trial of the suit.

A. T. M.

*Appeal dismissed : Case sent back.*

## APPELLATE CIVIL.

*Before Sir John Woodroffe, Knight, Judge, and Mr. Justice Newbould.*

RUSUFFZEMAN SARKAR AND OTHERS

v.

SANCHIA LAL NAHATA.\*

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June, 14.

*Civil Procedure Code (Act V. of 1908), Order XXI Rule 2—Payment out of Court to decree-holder—Certification, how to be made.*

A decree-holder applied for execution of his decree, and in his application relied upon a payment by a judgment-debtor as saving limitation. Upon an objection having been taken that the application was barred by limitation inasmuch as the payment was not certified :

*Held*, that the decree-holder might either apply to certify payment before execution or might do so on his application for execution of the decree. Under order XXI, rule 2 of the Code of Civil Procedure the certification need not be a certification on some days or at some time different from that on which the application for execution is made.

Appeal by the Judgment-debtors.

The decree-holder applied for execution of his decree, and at the time of the application for execution he notified to the Court by his application that he had received Rs. 10 from the judgment-debtors, and this payment saved the application for execution from being barred by limitation. The judgment-debtors contended that the payment could not save limitation inasmuch as it was not certified and that it did not operate to extend the limitation under the provisions of the Limitation Act. The Court of appeal below held that the payment saved limitation.

Against that decision the judgment-debtors preferred the appeal to the High Court.

\*Appeal from Appellate Order No. 11 of 1913, against an order of the District Judge of Rungpur, dated the 23rd September, 1912, reversing the order of Babu Bepin Chandra Chatterjee, Munsiff of Rungpur, dated the 29th January, 1912.

*Babu Purna Chandra Roy*, for the Appellants.

*Babus Mohini Mohan Chackravarty and Abinash Chandra Chukerbutty* for the Respondent.

The judgment of the Court was as follows :—

The point in this appeal is very narrow and very technical. It is the case of a decree-holder applying for execution of his decree. At the time of the application for execution, he notified to the Court by his application that he had received a certain sum from the judgment-debtor and the finding of the Court is that that sum had been paid in fact by the judgment-debtor by way of interest on the judgment-debt.

The decree-holder relies upon his payment as saving limitation and the judgment-debtor replies that it cannot have that effect, because the payment of Rs. 10 by the judgment-debtor was not certified; and in the next place, it did not operate to extend the limitation under the provisions of sections 19 and 20 of the limitation Act. The first point practically is this, that the certification which may be given by the decree-holder under order XXI, rule 2, must be a certification on some days or at some time different from that on which the application for execution was made. It appears to me that the decree-holder may either apply to certify payment before execution or may do so on his application for execution of the decree. In the present case, he did notify to the Court that he had received this sum of Rs. 10; and that is all that he has to do in order to certify payment. It is, however, said that the Court should then have recorded this certification.

It does not seem to me necessary under the circumstances, seeing that the application for execution was made and the Court acted on such application by allowing such execution to issue; moreover, the section speaks of "certified" or "recorded." I am, therefore, of opinion that order XXI, rule 2 does not stand in the way.

As regards the other point, it has been found that Rs. 10 was in fact paid by the judgment-debtor himself by way of interest. That finding is sufficient. The fact of the endorsement and the question as to who made it and the authority by which it is made are immaterial. The appeal fails and is dismissed with costs. We assess the hearing fee at three gold mohurs.

A. N. R. C.

*Appeal dismissed.*

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Sanchia Lal.

June, 14.



*Before Sir Asutosh Mookerjee, Knight, Judge,  
and Mr. Justice N. R. Chatterjee.*

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February, 18.

MAHENDRA NARAIN SAHA AND OTHERS

v.

GURUDAS BAIRAGI AND ANOTHER.\*

*Appeal—Attachment before judgment, application for—Notices issued—Defendant showed cause—Application, dismissal of—Civil Procedure Code (Act V of 1908), O. 38 R. 5, R. 6 Cls. (1) and (2), O. 43 R. 1 Cl. (g).*

The order contemplated by clause (1) of rule 6 of order 38 of the Code of Civil Procedure is an order of attachment; the attachment which the Court is directed by cl. (2) of the said rule, to withdraw, is a conditional attachment made in terms of clause (3) of rule 5.

Where the Court directed, on an application made by the plaintiffs for attachment before judgment, the issue of notices upon the defendants to show cause why an attachment should not issue before judgment, and at the same time directed the defendants not to part with the properties in any way:

*Held*, that the order was not in accordance with O. 38 R. 5 of the Code of Civil Procedure.

Where the Court upon the defendants appearing in the said notices and showing cause, hearing both parties and considering the affidavits filed by them, expressed an opinion that sufficient cause had not been made out for attachment and dismissed the application of the plaintiffs:

*Held*, that no appeal lay against the order of dismissal under O. 43 R. 1 Cl. (g) of the Code of Civil Procedure.

Appeal by the Plaintiffs.

Application for attachment before judgment.

The material facts and arguments appear from the judgment.

*Babu Mohini Mohun Chakravarty and Purno Chandra Roy* for the Appellants.

*Babu Jalindra Nath Lahiri* for the Respondents.

The judgment of the Court was delivered by

**Mookerjee, J.**—This appeal is directed against an order, whereby the Subordinate Judge has in substance dismissed an application for attachment before judgment. The respondents have taken a preliminary objection to the competency of the appeal.

The appellants contend that the order must be deemed to have been made under rule 6 of order XXXVIII of the Code of Civil Procedure, and is, consequently, open to appeal under rule 1 clause (g) of order XLIII of the Code. The respondents, on the other hand, urge that the order could not possibly have been made under rule 6, that it was probably made under Rule 5,

\* Appeal from Original Order No. 305 of 1915, against the order of *Babu Kunja Behari Gupta*, Subordinate Judge of Pabna, dated the 21st June, 1915.

and that, treated as an order under rule 5, it is not liable to be challenged by way of appeal.

To explain the relative situations of the parties, it is necessary to recapitulate briefly the course of events in the Court below. The suit was instituted on the 24th March, 1915. On the 3rd May 1915, the plaintiffs made an application for attachment before judgment under rule 5 of order 38 of the Code. Thereupon, the Court directed the issue of notices upon the defendants to show cause why an attachment should not issue before judgment, and at the same time directed the defendants not to part with the properties in any way. It is plain that this was not in strict accordance with the provisions of the Code, which were overlooked by the Court and the legal advisers of the parties. The order to be made in such circumstances will be found in Form No. 5 of Appendix F to the Code of Civil Procedure. That form plainly indicates that in a proceeding under rule 5, where the Court is satisfied by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct one of two things to be done, namely, *either* (a) to furnish security in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree. *or*, (b) to appear and show cause why he should not furnish security. The Court may also in the order direct a conditional attachment of the whole or any portion of the property required to be attached.

In the case now before us, the Court did not make an *ex parte* order upon the defendants to furnish security; nor did the Court direct them to appear and show cause why they should not furnish security. It is also plain that the Court did not direct the conditional attachment of the whole or any portion of the property required to be attached. We have, no doubt, been pressed by the appellants to take the view that the direction upon the defendants not to part with the properties in any way, was in essence an order of conditional attachment within the meaning of clause (3) of rule 5; but we are not prepared to accept this contention as well-founded. If the defendants had disobeyed the direction of the Court, they might possibly have rendered themselves liable to punishment for contempt of Court; but a transferee from them

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would not have been affected as he would have been, if there had been a conditional attachment of the property. We must take it, therefore, that the order as framed was not in accordance with rule 5.

The defendants, however, did appear and show cause on the 29th May, 1915. On the 21st June, 1915, both parties were heard and the affidavits filed by them were considered. The Court thereupon expressed the opinion that sufficient cause had not been made out for attachment, and dismissed the application of the plaintiffs. To enable the appellants to support this appeal, it is necessary for them to establish that this is an order under rule 6 of order 38 C. P. C. Now, the first clause of rule 6 provides that "Where the defendant fails to show cause why he should not furnish security or fails to furnish the security required within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached." The order contemplated by this clause of rule 6 is clearly an order of attachment. No such order admittedly has been made in this case. Clause (2) of rule 6 provides that "where the defendant shows such cause" (that is, shows cause, if called upon to do so, under clause (1) of rule 5) "or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn or make such other order as it thinks fit." It is plain that the attachment which the Court is thus directed to withdraw, is a conditional attachment made in terms of clause 3 of rule 5. No such order of withdrawal was made in this case and none, indeed, could have been made, as no attachment had been ordered. The position in substance, is that an application for attachment before judgment has been made under rule 5; the Court has heard the defendants and has dismissed the application. The parties never reached the stage contemplated by rule 6; consequently no appeal lies under order 43 rule 1 Cl. (q) C. P. C.

This appeal is, therefore, dismissed with costs; the hearing-fee is assessed at three gold mohurs.

A. T. M.

*Appeal dismissed.*

## PRIVY COUNCIL.

PRESENT :—*Viscount Haldane, Lord Parmoor, Lord Wrenbury,  
Sir John Edge and Mr. Ameer Ali.*

NAGINDAS BHUGWANDAS

v.

BACHOO HURKISSENDAS.

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October 27, 28, 29,  
November 1, 26.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY],

*Hindu law—Joint family property—Partition—Adopted son's share—Mitakshara—Mayukha—Dattaka Chandrika, section 5, paras 24 and 25—Adopted grandson shares equally with the natural-born grandson.*

In cases of the distribution of joint family property by partition an adopted son stands exactly in the same position as he would stand if he were a natural-born son of his adoptive father subject to the qualification that if there be a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally-born legitimate son.

Dattaka Chandrika, section 5, paras 24 and 25 construed.

N, a Gujerati Hindu subject to the Mitakshara and Mayukha, died leaving two sons H. and B. The former died leaving a widow G., who was pregnant, and the latter died leaving a widow M. to whom he had given authority to adopt. G. gave birth to a posthumous son, the respondent. M. adopted the appellant, who sued the respondent for partition of the joint family property :

*Held*, reversing the High Court, that the appellant was entitled to an equal share (one-half) with the respondent.

*Bachoo Hurkissendas v. Nagindas Bhugwandas* (1) reversed. *Raghunund Doss v. Sahe Churn Doss* (2) overruled. *Tara Mohun Bhattacharji v. Krifa Moyee* (3) and *Dinonath Mukerji v. Gopal Churn Mukerji* (4) approved.

Appeal from a decree of the High Court of Judicature at Bombay, dated the 2nd February, 1914, varying the decree of a single Judge of the same Court, dated the 13th November, 1913.

The suit in which the said decrees were made was instituted by the appellant, praying for partition between himself and the respondent of their joint ancestral estate, and the only question in the appeal was as to the shares to which they were respectively entitled therein.

The said estate had belonged to two brothers, Bhugwandas Nagardas and Hurkissendas Nagardas, as members of a joint and undivided Hindu family subject to the Mitakshara and Mayukha ;

(1) (1914) 16 Bom. L. R. 263.

(2) (1878) 1 L. R. 4 Calc. 425.

(3) (1868) 9 W. R. 423.

(4) (1881) 8 C. L. R. 57.

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Hurkissendas Nagardas died on the 14th September, 1900, leaving him surviving only his widow, Gungabai, who was then pregnant. Bhugwandas Nagardas died on the 17th December of the same year, leaving him surviving one daughter, Navalbai, and his widow, Mankorebai, to whom he gave express authority to adopt. On the 18th December, 1900, Gangabai gave birth to a posthumous son, who was the respondent in this appeal, and on the 17th February, 1901, Mankorebai adopted the appellant.

Macleod, J., who tried the suit, held that the appellant and the respondent were entitled to equal shares, but on appeal by the respondent Scott, C. J., and Batchelor, J., held that the appellant was entitled only to one-fourth share of the share of the respondent. For a report of the judgment of the High Court see *Bachoo Hurkissendas v. Nagindas Bhugwandas* (1).

Sir Robert Finlay K. C., De Gruyther, K. C., and Dunne, for the Appellant : The appellant is entitled upon partition with the respondent to an equal half share of their joint ancestral estate. The inferiority of an adopted son for purposes of inheritance is limited to the case where the adoptive father has a natural son born to him after the adoption. The reason why an adopted son receives a reduced share under these circumstances is that he would have taken the whole but for the subsequent event. That reason has no application except where the natural son's father is the adoptive father. The extension of the rule to collateral succession is not suggested by the text of *Vasishtha*, 15, 9, upon which the rule primarily rests and is inconsistent with the Mitakshara. Chap. I, section 5, of the Mitakshara in dealing with the shares of grandsons makes the primary division *per stirpes*, irrespective of the number or quality of the members of such *stirpe*. Chap. I, section 11, deals with the rights of sons according to their respective quality, but 'son' cannot consistently with the context be taken to include grandsons so as to extend the rule to competing collateral. The *Mayukha*, which is particularly authoritative among Gujeratis contains nothing in support of the respondent's contention : *Mayukha*, Ch. 4, section 5 (21) and (24).

The Dattaka Mimansa 10 (1) cites the rule as laid down by Vasishtha. The respondent's contention rests upon the Dattaka Chandrika, S. 5, paras. 24 and 25 and upon the interpretation wrongly put upon these paragraphs by Markby J. in *Raghubanund Doss v. Sudhu Churn Doss* (2). Paragraph 24, even with the addition

(1) (1914) 16 Bom. L. R. 263.

(2) (1878) I. L. R. 4 Calc. 425.

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of the words which Markby, J., points out are omitted from Mr. Sutherland's translation, and the first part of paragraph 25 support the appellant. The meaning of the second part of paragraph 25 is that if an adopted son himself adopts then his son could take no more than he himself was entitled to which might be according to Vasishtha's rule, a reduced share. The words "of the same description as himself" refer to the father not to the son. (Mayne's Hindu Law, 8th edition., paras. 169 and 170 referred to.) The translation of the paragraph used in the Court below is consistent with this view. The decision of Markby, J., was doubted or commented on in *Raja v. Subbaraya* (1); *Baramanund Mahanti v. Krishna Charan* (2); and in *Birbhadra Rath v. Kalpataru Panda* (3). The decision in *Taru Mohun Bhattacharji v. Kripa Moyee Debia* (4) is directly in the appellant's favour. That case was also followed in *Dinonath Mukerji v. Gopal Churn Mukerji* (5), the decision of Markby, J., being distinguished. If the Dattaka Chandrika S. 5, paras 24 and 25 can be interpreted as contended for the statement of later commentators must not be taken as over-riding the Mitakshara: *Putter Lal v. Parbati Kunwar* (6), and authorities there cited.

An adopted son has in every respect the same rights as a natural son unless curtailed by express texts: *Kali Komul Mozoomdar v. Uma Shunkur Moitra* (7)

Reference was also made to Dayabhaga, Ch. 10, paras. 10 and 13; Mitakshara, Ch. I, section 3, paras 1 and 2 and Ch. I, section 6; Mayne's Hindu Law, paras. 108, 164, 166, 168, 270, 275, 473, 474 and 504; Dattaka Chandrika, 5, 19, *Sri Balusu Gurulingaswami v. Sri Balusu Ramalaksmamma* (8); *Bhagwan Singh v. Bhagwan Singh* (9); *Puddo Kumaree Debec v. Juggut Kishore Acharjee* (10) and *Kali Komul Mozoomdar v. Uma Shunkur Moitra* (7) on the question of the authority of Dattaka Chandrika.

Clyde, K. C. and *R. B. Raikes* for the Respondent: An adopted member of a joint family always takes on partition with born members a quarter share. This is the meaning of the Dattaka Chandrika texts according to the appellant's translation

(1) (1883) I. L. R. 7 Mad. 253.

(2) (1884) 14 C. L. J. 183 (187).

(3) (1905) 1 C. L. J. 388 (404).

(4) (1868) 9. W. R. 423.

(5) (1881) 8 C. L. R. 57.

(6) (1915) L. R. 42 I. A. 155 (161); I. L. R. 37 All. 359.

(7) (1883) L. R. 10 I. A. 138; I. L. R. 10 Calc. 232.

(8) (1899) L. R. 26 I. A. 113 (131); I. L. R. 21 All. 460.

(9) (1899) L. R. 26 I. A. 153 (161); I. L. R. 21 All. 412.

(10) (1879) I. L. R. 5 Calc. 615 (626).

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admitted by the respondent and according to that in Sarkar's Law of Adoption at p. 399 where the omission in Sutherland's translation is supplied and the glosses are omitted. If this proposition is inconsistent with the Mitakshara it cannot be law but it is submitted that it is consistent with and necessarily follows from the Mitakshara. The first seven sections of Ch. I, of the Mitakshara are confined to the rights of natural-born (*aurasa*) sons of the same caste (*savarna*) and the rule in Ch. I, Sec. 5, paras. 1 and 2 on which appellant relies cannot help him, for not only is it a restrictive rule only limiting and not giving any rights but it is expressly confined to the *aurasa* son, the word *utpadana* signifying procreation being used throughout these verses. In section 7 the rights of *aurasa* sons who are not "*savarna*" are dealt with and they are assigned a reduced share, and this reduction must apply to members of the family who are "*aurasa*," but not "*savarna*," whether they come to share as sons or grandsons or great grandsons. Then in section 11, the secondary sons are enumerated and the rule of Yajnavalkya, the founder of the school, is stated according to which each class of these sons only shares at all, if all higher classes are absent. Then in mitigation of this rule the author introduces the texts of Vasistha and Katyayana, and gives his interpretation of them, and it is not the texts but Vijnaneswara's interpretation of them which is the Mitakshara law: *Collector of Madura v. Mootoos Rawalinga Sethupati* (1). He says in verse 26 that all of the secondary sons who are of the same caste and particularly the son of the wife take a fourth part, but the son of the wife can only share with his uncles or cousins for from the circumstances of his case he cannot have a brother. It is submitted therefore (1) that Vasistha's and Katyayana's exceptions at any rate as introduced into the Mitakshara were enabling exceptions giving the adopted son and other secondary sons a right to share where they co-exist with born sons, and (2) that these exceptions whether enabling or disabling were construed by Vijnaneswara as applying to every partition in a joint family. The reason it is submitted is the inferiority of the adopted member whether the test is consanguinity or sacrificial efficacy. He has of course no consanguinity and in funeral efficacy he is inferior to the natural-born member. See Mitakshara, I, 11; see the table of Nirnaya Sindhu the great Mahratta authority at p. 125 of Sarvadhikari's Hindu Law of Inheritance and the Dattaka Chandrika, section, 3, verses 1-3. The born member offers oblations to three generations of ancestors, the adopted son only to one if there are any born members in the family.

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The construction, now contended for, of the Dattaka Chandrika was conceded in *Raghubanund Doss v. Sadhu Churn Doss* (1). Appellant has to suggest that the last part of para. 24 and the whole of para. 25 are directed to proving only that the adopted son of an adopted son cannot take more than his father would have taken, a proposition which no one could dispute. Mr. Mayne after labouring this construction postulates of course rightly but without any authority that "neither can the natural son of an adopted son take more than his father would have," which is a much bolder proposition. The interpretation contended for, on the contrary, makes the author refute the following plausible but fallacious argument as the grandson succeeds to the share appropriate to his father, and as the share appropriate to the father of an adopted grandson (if natural born) is a full share therefore the adopted son of a natural son takes a full share. The fallacy is that the first proposition of the suggested argument is as the Dattaka Chandrika points out a *restrictive* (and not an enabling) rule, and after pointing out the impropriety which would result if it were enabling, the author explains that it is only true if the words 'the share appropriate for his father' are qualified by the addition of the words "if he had been of the same description (i.e. adopted or natural) as himself." Then the author links this up with his first statement of the proposition in the passage in verse 24 omitted by Sutherland, and finishes the subject by stating that the same rule applies to the great-grandson and to the exact limits of the coparcenary system.

The last sentence in verse 25 answers the appellant's contention that the rule is not intended to apply to a partition in a Mitakshara family and so does verse 30 which in terms refers to a partition during the father's life.

As to the cases cited by the appellant all the criticisms of *Raghubanund Doss v. Sadhu Charan* (1) have been *obiter dicta* in cases where the matter did not require consideration. *Tara Mohun Bhattacharji v. Kripa Moyce* (2) was decided on the translation of Sutherland with the material passage omitted relates only to collateral succession: *Dinonath Mukerji v. Gopal Churn Mukerji* (3) though it follows the last mentioned case as to collateral succession contains a *dictum* at p. 62 directly in respondent's favour. The decision of the Board in *Pudma Coomari Debi v. The Court of Wards* (4) and *Kali Komul Masoomdar v. Uma Shunkur Moitra* (5) adopt the reasoning and conclusion of Mitter, J., in the case

(1) (1878) I. L. R. 4 Cal. 425. (2) (1868) 9 W. R. 423.

(3) (1881) 8 C. L. R. 57.

(4) (1881) I. R. 8 I. A. 229; I. J. R. 8 Cal. 302.

(5) (1883) L. R. 10 I. A. 138; I. L. R. 10 Cal. 232.

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of *Puddo Kumaree v. Juggut Kishore* (1) but he mentions as one of the exceptions the very text of Yajnavalkya on which the respondent relies, Mitakshara, Ch. I, Secs. 11, 21, citing it with this addition, not found in the Mitakshara, "otherwise"—i.e. except that he does not share or present funeral oblations with the natural born or other superior sons—"the adopted son in every respect resembles the legitimate son."

Reference was also made to Dattaka Chandrika, Sec. 5, paras. 29 and 30; Mayne's Hindu Law, paras. 170, 269, 270, 271 and 477; and West and Buhler's Hindu Law, pp. 10 and 23.

Sir Robert Finlay, K. C., replied referring to Dattaka Mimansa, Sec. I, para. 66, and Sec. 2, para 64; *Suraj Bansi Koer v. Sheo Proshad Singh* (2); *Sumboochunder Chowdry v. Naraini Debia* (3) which has been consistently followed, e.g., *Pudma Coomari Debi v. The Court of Wards* (4) affirming the case of *Puddo Kumaree v. Juggut Kishore* (1) and *Kali Komul Mosoomdar v. Uma Shunkur Moitra* (5) affirming the case of *Uma Sunker v. Kali Komul* (6) [Mr. Ameer Ali referred to *Mokundo Lall Roy v. Bykunt Nath Roy* (7)].

The judgment of their Lordships was delivered by

November, 20.

Sir John Edge :—The suit in which this appeal has arisen is one for the partition of the joint family property of a family of Gujerathi Hindus, of which the plaintiff by adoption and the defendant by birth are the male members. The question in this appeal is one as to the share in the joint family property to which the plaintiff is on partition entitled.

The property in question belonged to a joint family, the male members of which were in 1900 Bhugwandas Nagardas and Hurkissendas Nagardas, the two surviving sons of Nagardas Shobhagdas who had died in 1893. Hurkissendas Nagardas died on the 14th September 1900, leaving his wife surviving; she was then pregnant, and the defendant, who was the posthumous child, was born on the 18th December, 1900. Bhugwandas Nagardas died childless on the 17th December 1900, leaving his widow surviving him; he had given to her an authority to adopt a son to him, and in pursuance of that authority she, on the 17th February 1901, adopted the plaintiff as a son to her deceased husband. The parties are

(1) (1879) I. L. R. 5 Calc. 615 (625).

(2) (1879) L. R. 6 I. A. 38 (99 and 100); I. L. R. 5 Calc. 148.

(3) (1833) 3 Knapp. 55 (60).

(4) (1881) L. R. 8 I. A. 229; I. L. R. 8 Calc. 302.

(5) (1883) L. R. 10 I. A. 138; I. L. R. 10 Calc. 232.

(6) (1880) I. L. R. 6 Calc. 256.

(7) (1880) I. L. R. 6 Calc. 289.

governed by the Mitakshara, as altered or interpreted by the Vyavahara Mayukha. The plaintiff claimed that he was entitled on partition to a moiety of the family property. On the other hand the defendant contended that the plaintiff, as an adopted son, was entitled to a reduced share only of the family property ; in support of that contention the defendant relied upon paragraphs 24 and 25 of section 5 of the *Dattaka Chandrika* as those paragraphs were construed and applied in the High Court at Calcutta by Markby and Prinsep, JJ., in *Raghubanund Doss v. Sadhu Churn Doss* (1).

This suit was tried in the High Court at Bombay by Macleod, J., who held that the doctrine according to which an adopted son on partition takes only a reduced share in the family property applies only in cases in which the competition is between an adopted son and a natural-born son of the same father (which is not the case here), and he gave the plaintiff a decree for an equal share. From that decree the defendant appealed.

On appeal Sir Basil Scott, C. J., and Batchelor, J., holding, as their Lordships understand their judgment, that there is nothing in the Mitakshara which is inconsistent with paragraphs 24 and 25 of section 5 of the *Dattaka Chandrika* as these paragraphs were construed by Markby and Prinsep JJ., in *Raghubanund Doss v. Sadhu Churn Doss* (1) adopted the construction of Markby and Prinsep, JJ., of those paragraphs, and decided that the plaintiff as an adopted son was on partition entitled only to a reduced share in the family property. From their decree this appeal has been brought.

The learned Judges of the High Court on the appeal from Macleod, J., in this suit had before them Sutherland's translation of paragraphs 24 and 25 of section 5 of the *Dattaka Chandrika*, the translation of those paragraphs which was relied upon by Markby and Prinsep, JJ., in *Raghubanund Doss v. Sadhu Churn Doss* (1) and a translation made by Sir Ramkrishna Bhandarkar, which appears to have been accepted as correct by the parties to this suit. Sutherland's translation was not a complete translation of the Sanskrit text. The translation which was relied upon by Markby and Prinsep, JJ., in *Raghubanund Doss v. Sadhu Churn Doss* (1) and is apparently accepted as a correct translation by Mr. Mayne in paragraph 169 of his *Hindu Law and Usage*, is as follows :—

Paragraph 24—"Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsman, the adopted son of the same description obtains his due share. And in the event of

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the ancestor having other sons, a grandson by adoption, whose father is dead, obtains the share of an adopted son. Where such son may not exist, the adopted son takes the whole estate even."

Paragraph 25.—"Since it is a restrictive rule that a grandson succeeds to the appropriate share of his own father, the son given, where his adopter is the real legitimate son of the paternal grandfather, is entitled to an equal share even with a paternal uncle, who is also such description of son; therefore a grandson who is an adopted son may (in all cases) inherit an equal share even with an uncle. This must not be alleged (as a general rule). For there would be this discrepancy where the father of the grandson were an adopted son, he would receive a fourth share; but the grandson if he were such son (of him) would receive an equal share (with an uncle in the heritage of the grandfather) and accordingly, whatever share may be established by law for a father of the same description as himself, to such appropriate share of his father does the individual in question (viz., the adopted son of one adopted) succeed. Thus, what had been advanced only is correct. The same rule is to be applied by inference to the great-grandson also."

The translation which was made by Sir Ramkrishna Bhandarkar is as follows :—

"It should be understood by this that an adopted son acquires the ownership wherever possible of his proper share by a relation similar to the relation, brotherhood, &c., by which a natural-born son acquires a right to the property of his brothers, &c. Similarly, an adoptive grandson whose adopting father is dead acquires the ownership of the share proper for an adopted (son) when the owner of the property has got another son or other sons and of the whole when he has got no son or sons. It should not be argued that because a grandson is necessarily the owner of the share proper for his father, the taker (in adoption) of the adoptive son being a natural-born son of the grandfather and entitled to a share equal to that of the uncle similarly born, the adoptive grandson should take a share equal to that of the uncle; for it involves impropriety, inasmuch as the adopted son gets one-fourth and the adoptive grandson an equal share. Therefore that share is proper for a son's father which he would get by law if he were of the same description (adopted or natural born) as the son. This way should be followed in the case of great grandsons also."

Their Lordships are not in a position to say which of those translations is the more literal translation, each is obscure, but in the

opinion of their Lordships neither translation warrants any conclusion as to the meaning of the author of the *Dattaka Chandrika* other than that at which their Lordships have arrived.

The author of the *Dattaka Chandrika* was in paragraphs 24 and 25 of section 5 of his Commentary, relying upon the text of Vashistha according to which "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part." That text of Vasistha is quoted by Nanda Pandita in paragraph 1 of section 10 of the *Dattaka Mimansa*, who added, "on the death of him (the naturally-born son) he (the adopted son) is entitled to the whole." It is obvious that Vashistha and Nanda Pandita were referring to cases in which the competition would be between an adopted son and a naturally-born subsequent son of the same father, and were not referring to cases in which on partition the competition would be between an adopted son of one member of a joint Hindu family and a naturally-born son of another member of the family, as for instance a naturally-born son of a brother or a nephew of the adoptive father.

The author of the *Dattaka Chandrika* expressed his views somewhat obscurely and confusedly in paragraphs 24 and 25 of section 5 of his Commentary, but their Lordships consider that it is not difficult to ascertain what his meaning was. For the purposes of his Commentary he paraphrased the text of Vasistha that "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part," and in paragraphs 24 and 25 of section 5 he illustrated the text of Vasistha, as he understood that text, by examples of its application.

His meaning is that in cases of the distribution of family property by partition an adopted son stands exactly in the same position as he would stand if he were a naturally-born son of his adoptive father subject to the qualification that if there be a competition between an adopted son and a subsequently-born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally-born legitimate son. The author of the *Dattaka Chandrika*, applying the well-established rule of Hindu law that a son takes no greater share than his father if a qualified person would have been entitled to, illustrated the application of the principle of the text of Vasistha by contrasting the case of a competition between an adopted son of a naturally-born son and that naturally-born son's naturally-born brother with the case of an adopted son of an adopted son competing with a naturally-born son of his adoptive father's adoptive father, in other words his uncle

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through the adoption of his adoptive father. In the first case, as the author of the *Dattaka Chandrika* pointed out, the adopted son would take a share equal to that of his uncle by adoption; in the latter case, as a son cannot take a greater share than his father would have been entitled to, the adopted son of an adopted son would take a less share than his uncle by adoption who was a naturally-born member of the family, and who would have taken a greater share than his brother by adoption.

As their Lordships construe paragraphs 24 and 25 of section 5 of the *Dattaka Chandrika* those paragraphs are not in conflict with any principle of the Mitakshara or of the Vyavahara Mayukha, and they are consistent with the reference to the text of Vasistha in paragraph 1 of section 10 of the *Dattaka Mimansa*. To construe and apply those paragraphs as they were construed and applied by Markby and Prinsep, JJ., in *Raghubanund Doss v. Sadhu Churn Doss* (1) would bring them into conflict with what are now well established principles of Hindu Law. The attention of Markby and Prinsep, JJ., in *Raghubanund Doss v. Sadhu Churn Doss* (1) which was decided by them in 1878, does not appear to have been drawn to the case of *Tara Mohun Bhuttacharji v. Kripa Moyee Debia* (2) which came on appeal before the High Court at Calcutta in 1868. In that case Loch and Hobhouse, JJ., held that an adopted son took the full share which his adoptive father would have taken in the property of a deceased collateral relative of his adoptive father. In *Tara Mohun Bhuttacharji v. Kripa Moyee Debia* (2) the plaintiff by birth and the defendant by adoption were in equal relationship to the deceased collateral; their respective grand fathers were the first cousins of the collateral and their respective fathers were his first cousins once removed. Loch and Hobhouse, JJ., were pressed in argument to put a construction upon paragraph 25 of section 5 of the *Dattaka Chandrika* adverse to the claim of the adopted son, but they held that an adopted son is entitled to all the rights and privileges of a son of the body legitimately begotten, where there is no such son subsequently born; and that there was no reason why the plaintiff and the defendant in the suit before them should not each take the share to which their respective fathers were entitled. The parties to the suit which was in appeal before Loch and Hobhouse, JJ., were governed by the law of the Dayabhaga, but that fact does not distinguish that case in principle from the case which is now before this Board. The decision in *Tara Mohun Bhuttacharji v. Kripa Moyee Debia* (2) was followed in 1881 by McDonell and

Field, JJ., in *Dinonath Mukerji and others v. Gopal Churn Mukerji and others* (1). In *Raja v. Subbaraya* (2), which was, however, a case relating to Sudras, Sir Charles Turner, C. J., and Muttusami Ayyar, J., in 1883 doubted that paragraph 25 of section 5 of the *Dattaka Chandrika* had been correctly construed in *Raghubanund Doss v. Sadhu Churn Doss* (3). Their Lordships are not aware of any case in the High Court at Bombay before the present suit came on appeal before that Court in which the construction of Markby and Prinsep, JJ., of paragraphs 24 and 25 of section 5 of the *Dattaka Chandrika* has been adopted.

In support of the judgment in the suit of the High Court at Bombay in appeal it was further contended before this Board on behalf of the defendant that the position of a member by adoption in a joint Hindu family, and his interest in the joint family property, are inferior to the position and interest of a member by birth of the family, and it was suggested that an adopted son does not on his adoption become a coparcener in the joint family property. It was endeavoured to establish that proposition by reference to the place which was assigned by Manu and other early authorities to the twelve then possible sons of a Hindu. As to this contention it is sufficient to say that whatever may have been the position and rights between themselves of such twelve sons in very remote times, all of these twelve sons, except the legitimately born and the adopted, are long since obsolete. A discussion as to their rights and interests, even if they could now be ascertained, would be beside the point and could throw no light on the construction of paragraphs 24 and 25 of section 5 of the *Dattaka Chandrika* or upon the position and rights of an adopted son. Hindu law and customs have not stood still, and what we are now concerned with is the position at the present time of an adopted son in a Hindu family. As early as 1833 this Board in *Sumboochunder Chowdry v. Naraini Debia and another* (4) considered that according to Hindu law an adopted son becomes for all purposes the son of the father by adoption. This Board in 1881 in *Pudma Coomari Debi v. The Court of Wards and another* (5) approved of the decision of this Board in *Sumboochunder Chowdry v. Naraini Debia* (4), and held that an adopted son succeeds not only lineally, but collaterally, to the inheritance of his relations by adoption, and also that an adopted son occupies the same position in the family of the adopter

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(1) (1881) 8 C. L. R. 57.

(2) (1883) I. L. R. 7 Mad. 253.

(3) (1878) I. L. R. 4 Cal. 425.

(4) (1833) 3 Knapp. 55.

(5) (1881) L. R. 8 I. A. 229.

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as a natural-born son, except in a few instances which are accurately defined both in the *Dattaka Chandrika* and the *Dattaka Mimamsa*. Those excepted instances relate to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father. To the same effect is the decision of this Board in *Pali Komul Mowoomdar v. Uma Shunkur Moitra* (1). In the last-mentioned case when it was before the Full Bench of the High Court at Calcutta, Romesh Chunder Mitter, J., held that—

“According to Hindu law an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter, as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family as if he were born in it.”

With that statement as to the Hindu law of adoption their Lordships agree.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the decree in appeal of the High Court at Bombay should be set aside and the decree of Mr. Justice Macleod should be restored.

The respondent must pay the costs of this appeal and of the appeal in the High Court.

Hughes and Son.—Solicitors for the Appellant.

Latteys and Hart.—Solicitors for the Respondent.

J. M. P.

Appeal allowed.

(1) (1883) L. R. 10 I. A. 138.

PRESENT :—*Viscount Haldane, Lord Parmoor, Lord Wrenbury,*
Sir John Edge and Mr. Ameer Ali.

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1915.

November 8, 9, 22.

MUSAHAR SAHU AND ANOTHER

v.

LALA HAKIM LAL AND ANOTHER.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.]

Debtor and creditor—Transfer of Property Act (IV. of 1882) Sec. 53—Suit to set aside decree being void as delaying or defeating creditor—Decree executed

for good consideration—Preference by debtor to one creditor rather than another where debtor retains no benefit for himself.

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In a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts.

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave others unpaid.

In re Moroney (1) and *Middleton v. Pollock* (2) followed.

Where a transfer was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it could not be impeached under section 53 of the Transfer of Property Act, though the plaintiff, who was a creditor, was a loser by payment being made to the preferred creditor (a defendant).

Decision of the High Court dismissing the suit to set aside, under the Transfer of Property Act, section 53, the instrument of transfer in this case, was affirmed.

Appeal from a judgment and decree of the High Court at Calcutta (Mookerjee & Holmwood JJ.) [*Hakim Lal v. Musahar Sahu* (3)] dated the 3rd April, 1907, reversing a judgment and decree of the Second Subordinate Judge of Mozufferpore, dated the 30th July, 1904.

The plaintiffs were the appellants to His Majesty in Council.

The main questions for determination on this appeal were : (a) whether the sale and conveyance of certain properties to the respondents by the defendant Kishun Binode Upadhyaya (a judgment-debtor of the appellants) by a deed of the 2nd September, 1901, is liable to be set aside as being a fictitious transaction executed in fraud of the appellants : (b) whether the suit can be maintained to set aside the said deed as being in fraud of creditor under section 53 of the Transfer of Property Act ; and (c) whether the said conveyance is void or voidable under that section.

The facts are stated in the report of the case in the High Court in *Hakim Lal v. Musahar Sahu* (3).

B. Dube for the Appellants contended that the conveyance to the respondent Hakim Lal, dated the 2nd September, 1901 was part of a fraudulent and collusive conspiracy to which the respondents were parties. The two kobalas executed on that date were parts of one

(1) (1887) L. R. 21 Irish 27.

(2) (1876) L. R. 2 Ch. Div. 104 (108).

(3) (1907) I. L. R. 34 Calc. 999 ; 6 C. L. J. 410.

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transaction, and if one of them, as had been held by both the Courts below, was fictitious and not made for good consideration the other one as being part of the same transaction must be void also. It was executed in bad faith with the intention of delaying and defeating the creditors. The fact that the deed was made for good consideration did not make it valid, if it was not *bona fide*, but made for the purpose of defeating the appellant's claim : *Cadegan v. Kennatt* (1) ; merely giving a good consideration was not conclusive evidence of good faith ; and the *onus* was on the respondents of showing that the deed was made *bona fide*. That was not proved, and the deed was, it was submitted, liable to be set aside under section 53 of the Transfer of Property Act.

[Viscount Haldane referred to the case of *Middleton v. Pollock* (2). Here the debtor has not retained any benefit for himself. Giving priority or preference to one creditor rather than another is immaterial.]

A. M. Dunne for the Respondents was not called upon.

The judgment of their Lordships was delivered by

November, 21.

Lord Wrenbury :—On the 2nd September, 1901, Kishun Benode executed two *kobalas* or conveyances, the one to Kamta Prashad and the other to Hakim Lal. They were conveyances of certain lands, the parcels in the second deed being much more numerous than those in the first deed. Kamta Prashad was the nephew of Ram Aotar Lal, a brother of Hakim Lal. He was a minor and Ram Aotar Lal was his guardian.

The plaintiff, Musahar Sahu, was at this date a creditor of Kishun Benode. He had on the 14th December 1900 sued for the debt and on the 5th January 1901 had presented a petition for security by way of attachment before judgment. On the 11th February 1901, Kishun Benode had made an affidavit that he did not intend to transfer any of his properties, and accordingly on the 11th February 1901, the petition was dismissed.

In this state of facts the two *kobalas* were executed by the debtor on the 2nd September 1901.

On the 5th December 1901 the plaintiff obtained judgment in his action for Rs. 12,695-10 and costs. The defendant did not appear at the trial. On the 21st December 1901, Kishun Benode applied for a re-hearing, but on the 2nd August 1902 that application was dismissed by default. In the interval, viz., on the 11th June 1902, the transferees had obtained an order for registration of their names in respect of the properties transferred.

Under these circumstances two suits were brought to set aside

(1) (1776) 2 Comp. 432 (434).

(2) (1876) L. R. 2 Ch. D. 104 (108).

the *kobalas* on the ground that within section 53 of the Transfer of Property Act IV of 1882, the transfers were made with intent to defeat or delay the creditors of Kishun Benode.

The Subordinate Judge set aside the first *kobala* on the ground that no consideration was paid, that a debt of Rs. 6,335 therein alleged to be due to Kamta Prashad was fictitious, that the transfer was made gratuitously, and that the transfer was made with intent to defraud. An appeal was dismissed with costs, and this decision is not questioned before this Board.

As regards the second *kobala*, there are concurrent findings that the consideration for this deed was real and not fictitious. The Subordinate Judge nevertheless decided in favour of the plaintiff. Upon appeal this decision was reversed, and the second *kobala* upheld. From that decision the plaintiff has brought this appeal.

- 'The appellant has not argued that the law is wrongly laid down in the judgment of the High Court. His contention is that the two deeds of the 2nd September, 1901 form really one transaction, and that the second *kobala* must fall with the first.

As matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion rightly stated by Palles, C. B., in *Re Moroney* (1), where he says :—

"The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. It follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property, although the effect of it or even the interest of the debtor in making it, may be to defeat an expected execution of another creditor, is not a fraud within the Statute, because notwithstanding such an act, the entire property remains available for the creditors or some or one of them, and as the Statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected."

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one

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creditor and leave another unpaid : *Middleton v. Pollock* (1). So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy.

The argument presented to their Lordships has in substance been that the transaction of the 2nd September 1901 was one transaction : that (1) Kamta Prashad, the nephew, the minor and ward, and (2) Hakim Lal, the uncle of Kamta and brother of Ram Aotar Lal, the minor's guardian, are for this purpose not distinguishable as independent transferees, that from the 11th February 1901, until after the 11th June, 1902, Kishun Benode was playing for time, and that this fact and the fact that the former *kobala* was fictitious and fraudulent show that the latter *kobala* was fraudulent also. Their Lordships do not accept this contention. The *kobala* in favour of Hakim Lal must stand or fall on its own merits. The concurrent findings that the consideration for the deed was real reduces the case to one in which the debtor has preferred one creditor to the detriment of another, but this in itself is no ground for impeaching it under the section even if the debtor was intending to defeat an anticipated execution by the plaintiff.

Their Lordships will humbly advise His Majesty that the appeal should stand dismissed with costs.

T. L. Wilson & Co. :—Solicitors for the Appellants.

Watkins and Hunter :—Solicitors for the Respondents.

(2) (1876) L. R. 2 Ch. D. 104 (108).

J. M. P.

Appeal dismissed.

PRESENT :—*Viscount Haldane, Lord Parmoor, Lord Wrenbury,
Sir John Edge and Mr. Ameer Ali.*

PANDIT PARBHU DYAL

v.

KALYAN DAS AND OTHERS,

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1915.

*November, 10, 11,
December, 14.*

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE
NORTH-WESTERN PROVINCES, ALLAHABAD].

Restitution—Civil Procedure Code (Act X of 1877), section 583—Decree for redemption reversed on appeal—jurisdiction of the Court to which application for restitution is made to award mesne profits not given by the decree of the appellate Court.

A mortgagor obtained a decree for redemption of a usufructuary mortgage from the Court of first instance, and in execution of that decree he was put in possession of the mortgaged property on payment of the decretal amount to the mortgagee. On the mortgagee's appeal the High Court increased the amount payable on redemption by a sum which the mortgagor failed to pay. The mortgagee, thereupon, applied to the Court of first instance for possession and also for mesne profits for the period during which he was out of possession :

Held, affirming the High Court, that the Court of first instance had jurisdiction under section 583 of the Code of Civil Procedure, 1877, not only to make restitution by restoring possession, but also to award mesne profits although the decree of the High Court had not expressly given such profits ; that if the order giving mesne profits was wrong, the parties aggrieved had their remedy either by appeal to the High Court or by an application for revision ; and that the proceedings taken under that order culminating in the sale at which the mortgagee purchased the equity of redemption were valid and the appellant, an assignee of the mortgagor's rights in the mortgage, was not entitled to maintain a suit to redeem it.

Parbhu Dyal v. Ali Ahmad (1) affirmed.

Consolidated appeals against the judgments of the High Court of Allahabad, dated 5th November, 1909, dismissing appeals preferred respectively against the judgments of the Court of the Subordinate Judge of Aligarh, dated the 27th September, 1907, and pronounced in Original Suits Nos. 24 of 1906 and 173 of 1906.

The facts are fully stated in the judgment of the High Court which is reported in *Parbhu Dyal v. Ali Ahmad* (1).

Both suits related to land which was formerly the property of

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Ram Baksh and was by him mortgaged with possession to Debi Das in 1863 to secure Rs. 7,700.

The present appellant as plaintiff in the first suit sought to redeem the mortgage of Ram Buksh from whom he derived title. That suit was dismissed on the view that Debi Das had himself acquired the equity of redemption by purchase for Rs. 5,615 at a Court sale which was held in 1881 under the circumstances mentioned in their Lordships' judgment. In the second suit the question of the present appellant's right to redeem the said mortgage was also involved and he was joined as a defendant. The judgment therein following the decision in the other suit, was against him and for the plaintiffs.

Sir H. Erle Richards K C., and *Kenworthy Brown*, for the Appellant : An order by the Court of first instance for the payment of mesne profits could only be made under section 533 of the Code of Civil Procedure, 1877, in a case where the applicant was entitled to such profits under the decree of the High Court. But here the decree of the High Court is silent on the point and the Subordinate Judge had no jurisdiction in execution thereof to make the order of the 2nd June, 1879 giving mesne profits. As the order was without jurisdiction all the proceedings taken thereunder were invalid and void, and consequently the order for the sale of the equity of redemption and also the actual sale thereof to mortgagee were invalid and void. Reference was made to section 244 of the Code of Civil Procedure, 1877 ; and *Kalka Singh v. Parasram* (1). The mortgagee, after he had received payment in 1878 of the mortgage debt, retained it, and entered into possession again as mortgagee. By purchasing the equity of redemption at the Court sale held under an order made without jurisdiction, the mortgagee could not get rid of his liability to be redeemed, and notwithstanding such a purchase his possession was still that of a mortgagee. *Khairajmal v. Daim* (2) was referred to. The daughters of Zahur Ahmad Khan were not parties to, or in any way represented in, the suit of 1877, and the sale certificate of February 11, 1883, did not affect their right to redeem, and the appellant was entitled to enforce that right.

De Gruyther, K.C., and *Dube*, for the Respondents, were not called upon.

(1) (1894) L. R. 21 I. A. 66 ; I. L. R. 22 Calc. 434.

(2) (1904) L. R. 32 I. A. 23 (33) ; I. L. R. 32 Calc. 296.

The judgment of their Lordships was delivered by

Mr. Ameer Ali :—The facts on which the two suits that have given rise to the present appeals were brought in the Court of the Subordinate Judge of Aligarh, are fully set out in the judgment of the High Court of Allahabad. It is sufficient, therefore, to state shortly the circumstances which form the basis of the appellant Parbhu Dyal's claim. He was the plaintiff in one of the actions (24 of 1906) which was a suit for the redemption of a mortgage, whilst in the other (173 of 1906) he was joined as a defendant. Both suits, however, related to a village called Lodhamai. A half share of this property, in the nomenclature in vogue in this part of the country described as a 10 biswas share, belonged originally to one Ram Bakhsh. In the year 1863, Ram Bakhsh executed a usufructuary mortgage in respect of this share for a term of eleven and a half years in favour of one Debi Das since deceased. It may be noted here that just as 16 annas constitute the integral unit in Bengal and other places, 20 biswas form the unit in most parts of Upper India; 20 biswas going to a biswa. The mortgage deed in favour of Debi Das provided that the mortgagee should remain in undisturbed possession of the mortgaged property and take the rents and profits in lieu of interest. The principal money secured by the mortgage was never repaid and Debi Das continued to hold the share after the expiration of the term for repayment. In the meantime, Ram Bakhsh was dealing with the equity of redemption; in 1866 he assigned his right in 7 biswas of his 10 biswas to the minor sons of a person named Zahur Ahmad; a little later he sold to Zahur Ahmad himself 2 biswas 19 biswasis, and subsequent thereto the remaining fraction left in his hands to the mortgagee Debi Das. The outstanding equity of redemption in respect of 9 biswas 19 biswasis thus vested in Zahur Ahmad and his sons. Zahur Ahmad died shortly after, leaving as his heirs besides his sons several daughters and two widows. His estate, including the right to redeem the mortgage to Debi Das, accordingly devolved on his heirs. In 1877 his sons under the guardianship of their mother brought a suit for redemption against Debi Das; and in May 1878 they obtained a decree for possession on payment to the mortgagee of a specified sum. This money appears to have been paid into Court, and the plaintiffs obtained possession of the property in July 1878. The decree of the Court of first instance was, however, varied on appeal by the High Court, which directed payment by the plaintiffs of a further sum of Rs. 9,000. This they failed to do and the mortgagee was restored to possession by an

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order of the Court in April 1880. Debi Das then applied to the Court for an order for mesne profits for the period during which he was out of possession, and in March 1881 he succeeded in obtaining a decree for a sum of over Rs. 5,000. In execution of this decretal order he caused the outstanding equity of redemption to be attached and sold, and at the auction sale purchased the same himself. After his purchase as aforesaid he purported to deal with the property as absolute owner; he mortgaged the property to one Sagar Mal who obtained a decree on his mortgage, and in execution of that decree the defendants in suit 173 of 1906 purchased the share in question in 1897. In suit 173 of 1906, which has given rise to appeal 75, the heirs of Debi Das are the plaintiffs, and they seek to redeem the property on the ground that although Debi Das after his purchase in 1881 became the absolute owner, the defendants had in the auction sale held in 1897 only acquired his mortgagee right.

The sons of Zahur Ahmad on the other hand continued to deal with their right to the equity of redemption as still subsisting in them; and by two deeds of sale, assigned to Parbhu Dyal, the appellant, a 5-biswas share of the property. Parbhu Dyal, after failing in one suit in 1905 on the ground of non-joinder of parties, brought in 1906 the present action to redeem the mortgage executed by Ram Bakhsh in 1863 and for ancillary reliefs. He contended in the Courts below, as has been contended before this Board on his behalf, that the decree for mesne profits and all the proceedings thereunder, culminating in the sale at which Debi Das purported to purchase the equity of redemption, were made without jurisdiction and conveyed no title to the purchaser; and as they were mere "nullities" the right of his assignors was unaffected, and by virtue of the assignment to him he is entitled to redeem.

Both Courts have overruled his contentions and dismissed his suit. Their Lordships fully concur in the reasons given by the High Court for disallowing the plaintiff's claim. As the learned Judges point out, the Court which awarded the mesne profits had full jurisdiction in that behalf; if it exercised the jurisdiction wrongly, the persons aggrieved had their remedy under the provisions of the Indian Code of Civil Procedure, either by appeal to the High Court or by an application for revision. Objection was in fact taken under section 31 of the Civil Procedure Code (1882) to the sale for mesne profits, which was disallowed, and there was no appeal from that order. The present action, in their Lordships' opinion, is wholly misconceived. It was further urged on appellant's behalf that he was at any rate entitled to redeem the share of Zahur Ahmad's

daughters who were no parties to the suit of their brothers or to the subsequent proceedings held therein. Their Lordships are not satisfied that any right was in fact conveyed to Parbhu Dyal by those ladies, or that if any right was conveyed as alleged what its extent was.

The appeal will be dismissed with costs to be paid by the appellant, Parbhu Dyal, to the respondents who are represented at the hearing.

It is admitted that this judgment will govern appeal 75, which arises out of suit 173 of 1906 brought by the heirs of Debi Das. This appeal will also be dismissed.

And their Lordships will humbly advise His Majesty accordingly.

Douglas Grant:—Attorney for the Appellant.

Barrow, Rogers and Nevill:—Solicitors for the Respondents.

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Appeals dismissed.

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APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.

KISSENDROYAL JITSARIA AND OTHERS

ASKARAN CHOWTHMULI.*

Civil

1916.

January, 27, 28.

Contract—Right of buyer on breach of warranty in respect of goods not ascertained—Indian Contract Act (IX of 1872), Sec. 118—Goods not in accordance with contract—Goods, when to be rejected—Reasonable time—Burden of proof.

A contract was made on the 23rd April, 1914 for 125 bales of jute. It was guaranteed to yield after cutting 70 per cent. good sacking warp and the payment was to be made when the buyers (defendants) received the documents from the Railway Company, the vendor (plaintiff) was to receive 90 per cent. of the price and the balance 10 per cent., when the goods were actually delivered. The documents were received by the defendants from the Railway Company on the 28th July and the goods were actually delivered to them on the 31st July. The goods were found to be inferior in quality. The defendants did not adduce sufficient evidence that they definitely rejected the goods before the 22nd August. In a suit for recovery of price of 125 bales of jute :

* Appeal from Original Decree No. 70 of 1915, against the decree of Mr. Justice Chaudhuri, sitting on the Original Side, dated the 16th August, 1915.

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Held, that the goods not being in accordance with the contract, the defendants, if they chose, could have rejected them when tendered or kept them for a time reasonably sufficient for examining and trying them, and then refused to accept them.

That the burden lay upon the defendants to prove that they did in fact reject the goods, and as they failed to discharge such onus, they were liable for the price.

Appeal by the Defendants.

Suit for recovery of price of 125 bales of jute.

The material facts appear from the judgment of Mr. Justice Chaudhuri, which is as follows :

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Chaudhuri, J.—By a contract dated the 23rd April 1914 the plaintiff firm sold to the defendants 125 bales of Dacca or Faridpore district jute at Rs. 13 per bazar maund. The shipment was to be in July. The defendants were to declare the Mill or baler's name by the 30th June 1914. The jute was to be 3S guaranteed to yield 70 per cent. good sacking warp. It was provided that "reimbursement was to be 90 per cent. demand draft against documents, and balance cash on delivery".

The plaintiffs allege that under the defendants' instructions they sent the goods to the Cossipore Road station, E. B. S. Ry, and on the 28th July 1914 sent the defendants the Railway receipt for 125 bales and their bill for Rs. 4954-10 being 90 per cent. of the value thereof. The defendants, it is said, kept the Railway receipt and bill and promised payment. The goods covered by the Railway receipt were taken delivery of by the defendants from the Railway Station on the 31st July, 1914. The plaintiffs allege that repeated requests were made for payment, but the defendants did not pay the price, but that on the 22nd August 1914, for the first time, alleged that the goods were of inferior quality and purported to cancel the contract.

In this suit the plaintiffs claim Rs. 5,523-6 being the value of the goods and Rs. 441-14 for interest.

The defendants admit the contract and the receipt of the Railway receipt and bill, but say that they agreed to pay 90 per cent. of the value if the goods on examination proved to be of contract quality. This they say was verbally arranged although the contract has a different provision, which is therefore unacceptable. That they took delivery from the Railway godown, is admitted, but they say that they found on examination that the goods were not of contract quality, but inferior and therefore rejected same and informed "the plaintiffs' zamadar" not named, "one Babu Jitnull" and

the plaintiff's gomastha and the broker, that they had rejected the goods on that ground, and they say further that although they repeatedly requested the plaintiffs to remove the goods, the plaintiffs never removed them; that the goods are still in the godown hired by them and the defendants claim to be entitled to Rs. 270 for godown rent, Rs. 171-4 for freight which they paid and Rs. 27-13-6 for cart-hire etc.

The first question I am called upon to determine is, as to whether the goods were of the guaranteed quality. The jute came from the Faridpore district and the plaintiffs' broker says that it was of contract quality. As against this, we have the evidence of Mr. Georgiadi and Mr. Gregory. Mr. Georgiadi examined the jute on the 28th May 1915 nearly a year after delivery. He says that the jute, he examined, was inferior in quality and hardly likely to give more than 60 per cent. warp. "It was heavily rooted and croppy." Mr. Gregory examined the jute on the 17th June 1915. He estimates the yield to be about 55 per cent. He also says that "the jute was very croppy and heavily rooted" and contained "weak jute." As regards the weak jute he said that the jute had not deteriorated, although it may have been delivered in July 1914. He further said that if the jute had been originally packed wet or damp, and kept this long period, it would have lost colour and the fibre would have become weak and rotten and got marked. He found no such signs and concluded that the jute had been originally packed very dry. The method of examination by both these gentlemen was the same. They opened some of the bales and looked at the jute. It appears from Mr. Gregory's evidence that no expert can distinguish between jute yielding 65 per cent. and 70 per cent. When he examined the jute he did not know which year's goods they were. He judged the weak jute in the consignment to be about 5 per cent. In judging he said that the margin might vary up to 10 per cent. So his estimate about 55 per cent would allow a margin of 10 per cent and if his statement is correct that no expert can distinguish between 65 per cent and 70 per cent, his evidence as regards quality does not appear to be of much value in this case.

Mr. Georgiadi said that he could distinguish between 65 per cent and 70 per cent. He found the fibre sound, but the jute croppy and heavily rooted. The best and most reliable method of examination is to measure the fibre, cut the ends, and to weigh to find out the percentage of yield. This is the method which obtains in Mills and was not resorted to in this case. Having regard to the

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evidence of Mr. Gregory, who seemed to me to give his evidence in a very fair manner, I cannot hold that the jute was of such an inferior quality, as alleged by the defendants, as to entitle them to reject. Mr. Gregory said that 10 per cent of the value is usually kept in hand in these contracts to provide for allowance in case of some inferiority; that he had never heard of a case in which goods had been rejected and not taken, upon an allowance in cases of such a difference, but I am not concerned in this case with any practice relating to this matter. None has been pleaded. Mr. Georgiadi was emphatic in his opinion about the quality, but I am unable to attach the same value to his evidence as to that of Mr. Gregory. He did not at first admit that he knew what the dispute was between the parties, but when referred to his own report, he admitted that he knew it, at the time of his inspection.

It seems to me that the jute was perhaps somewhat inferior in quality, but the plaintiffs urge, as it was a falling market which is admitted it was unreasonable for the defendants to keep the goods with them up to the 22nd of August 1914 before they purported to reject the goods as of inferior quality; that they could keep the goods only for a reasonable time for inspection. But having kept the goods so long, they had no right to reject the goods on that date, according to section 118 of the Contract Act. The defendants allege that they informed the plaintiffs' people that they had rejected the goods long before that date, and assert that they did so within a day or two after the arrival of the goods. The plaintiffs' zamadar mentioned in the written statement, the defendants are unable to name or identify. The person named as "one Jitmull" in the written statement is now said to be one of the plaintiffs, Jodhraj. Jodhraj has been examined and denies that there was any such conversation between him and the defendants. He stated that he was not known as Jitmull. The plaintiffs' broker has been examined and states that he heard of the rejection long after the arrival of the goods and that no complaints were made to him by the defendants before the 22nd of August. He went and examined the jute and found it satisfied the guarantee.

In this case there was no inspection by the buyers in the presence of the sellers as seems to be the practice, and no notice of inspection was given to the plaintiffs.

Bhoramall was the plaintiffs' gomastha at the time; he is dead. Champalal is also one of the plaintiffs' gomasthas and he has been examined. The plaintiffs have called all their available men. There being direct contradiction in the statements of the witnesses,

the oral evidence is unsafe to rely upon. The correspondence about the rejection of the goods begins from the 22nd August. The letter of that date does not indicate that the goods had been rejected before that date. One other noticeable circumstance in connection with this matter is that the original bill for 90 per cent was throughout kept by the defendants. If they had rejected the goods immediately after their arrival, there was no reason why this bill was not returned to the plaintiffs. This rather indicates that the plaintiffs' version that the defendants had kept the bill and put off payment from time to time is true.

I hold there is no satisfactory evidence that the defendants rejected the goods to the knowledge of the plaintiffs before the 22nd August. The market had gone down owing to the war to about Rs. 5 per maund by the 20th August. It is very likely that the defendants waited to see how the market turned out. I think it was an unreasonable time to have kept the jute before rejection, and under the circumstances, I hold in the plaintiffs' favour and decree the suit with costs on Scale No. 2.

Against this order, the defendants appealed.

Messrs. Gregory and S. C. Bose for the Appellants.

Messrs. A. N. Chowdhury and N. Sirkar for the Respondents.

The following judgments were delivered:

Sanderson, C. J.—This is an appeal from the judgment of Mr. Justice Chaudhuri in which he gave judgment for the plaintiff.

The action was brought to recover the price of 125 bales of jute, and the defence, was that the delivery of the jute was not in accordance with the contract, and that in consequence of the inferior quality of the jute the defendants rejected the jute.

Now, the contract was made on the 23rd of April 1914, for 125 bales of jute: It was guaranteed to yield after cutting 70 per cent. good sacking warp, and the payment was to be made as follows: reimbursement 90 per cent demand draft against documents and balance cash on delivery: That meant, and as I understand it was agreed to by both learned counsel who argued this case, that when the buyers received the documents from the Railway Company, the plaintiff was entitled to receive 90 per cent. of the price, and when the goods were actually delivered then the balance namely, the 10 per cent. was to be paid.

Now, the documents were received by the defendants from the Railway Company on the 28th of July, and these documents, as I understand, included a bill made out by the plaintiff for 90 per cent. of the price. The goods were actually delivered to the

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defendants on the 31st of July, and were taken to the defendant's godown where they remained until the time the action was brought.

The learned Judge has found first of all that the goods were *somewhat* inferior in quality. Speaking for myself, having read the evidence and carefully considered it, I think he was fully justified in coming to that conclusion, and I am not sure that if I had been trying the case I should not have omitted the qualifying word *somewhat* and held that the goods were inferior in quality. I need not go through the evidence in detail, because I agree with the learned Judge upon that point. There clearly was evidence upon which he could come to that conclusion, and, in my opinion, he was right in arriving at that decision. Of course, that does not end the matter : The goods not being in accordance with the contract, the defendants if they chose could have rejected the goods, and the law in this respect is made by the terms of the section to which we have been referred viz,—section 118 of the Indian Contract Act. That section provides, “where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken, the buyer may accept the goods or refuse to accept the goods when tendered.” —(That does not apply to this case, because the defendants did not refuse to accept the goods when tendered). “Or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them.” On the 22nd of August, a letter was written by the defendants to the plaintiff in which they do say definitely that they rejected the goods on account of their inferior quality. But it is admitted by Mr. Gregory, counsel for the appellant, that if the defendants had done nothing before the 22nd of August or rather that if they had not rejected the goods before the 22nd of August, they would not have rejected them *within a reasonable time* : and, if I may say so, he was perfectly right in making that admission, because nobody could suggest that business people with regard to a contract of this kind could sit still for three weeks after the goods were delivered taking no action with regard to them and then came forward after three weeks and say ‘we reject the goods.’ Therefore, the whole matter on this part of the case is reduced to this : Did the defendants reject the goods at sometime before the 22nd of August, and if they had rejected the goods, did they reject them within “a reasonable time” ? The learned Judge has found that the defendants did not reject the goods before the 22nd of August. As I read his judgment, he said the verbal evidence upon that point was contradictory and he was not

able upon the oral evidence to make up his mind either one way or the other, and therefore, he said that reliance must be placed upon the documentary evidence.

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Now, the only documentary evidence with regard to the rejection is the letter of the 22nd of August to which I propose to refer : That letter says this,—it was written by the defendants themselves to the plaintiff.—“We beg to state that your 125 bales of Jobsa Jute under the above contract (i.e. contract No. 432 of G L. Dudhuria 125 bales) had already reached our godown, but we regret to inform you that the quality of the same is much inferior to that guaranteed by the contract. We cannot accept the same as a fair tender against the contract and must reject the lot, which please remove from our godown at once. In the meantime the bales are lying at your entire risk and responsibility. Furthermore you are liable for the godown rent. The matter was brought to your notice on several occasions verbally.” The first thing I wish to say about this letter is that it is in answer to a letter of the 20th August written by the plaintiff pressing for payment of Rs. 4,950-10-0, which represented the 90 per cent. of the contract price. It is also to be observed that the last sentence “The matter was brought to your notice on several occasions verbally,” upon which so much reliance was placed by the appellants’ learned counsel is to my mind ambiguous : The defendants in that letter are referring to two things : They are referring to the fact that the goods were inferior to the quality, guaranteed by the contract ; they are also referring to the fact that they rejected the same. When they say that ‘that matter was brought to your notice on several occasions verbally,’ it may mean that ‘on a previous occasion we told you that we rejected them, or it may mean that we drew your attention to the fact that the goods were not in accordance with the contract quality.’ Therefore, to my mind the letter is not conclusive either one way or the other.

Now, what is the position ? The defendants accepted the goods in this sense that they allowed them to be placed in their godown on the 31st of July. They say that they examined them either the next day or a day or two afterwards. What would one expect business people to do if the buyers found that the goods were not of the contract quality, and if they intended to reject them ? I should have expected business people to put on record at once by writing to the sellers and saying that the goods were not in accordance with the contract quality, and that they rejected them. We cannot find the slightest trace

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of that in this case ; the only letter which does in so many words say that they rejected these goods was written as late as the 22nd of August and then that was written in answer to a letter pressing them for payment. I must also say that inasmuch as the goods were delivered to the defendants, it is obvious that the *onus* of proving that they in fact rejected, lies upon them, and the learned Judge in effect says that the defendants have not satisfied him that they did in fact reject the goods. Of course, if the learned Judge took that point of view he was perfectly right in saying that the defendants had not rejected the goods. Speaking for myself, I have read the evidence very carefully, and I am not satisfied upon the evidence which has been put before me that the learned Judge was wrong ; and, that would be quite sufficient for me. I need not say anymore, because there was evidence both ways ; the learned Judge was there to give his decision upon this question of fact, which is a pure question of fact and no matter of law is appertaining to it, and it is quite sufficient for me to say that I am not satisfied that the learned Judge was wrong. I may go further and say that I think it is quite possible that what happened was that there were conversation between the parties with regard to the quality of the goods, discussions as to what had been done and so on, but I am quite satisfied that the defendants have not given sufficient evidence to discharge the *onus* that they definitely rejected the goods before the 22nd of August.

For these reasons I think that the appeal should be dismissed with costs.

Woodroffe, J.—I agree.

Mookerjee, J.—I agree.

Mr. A. T. Das—Attorney for the Appellants.

Mr. H. C. Banerjee—Attorney for the Respondents.

A. T. M.

Appeal dismissed.

CRIMINAL REVISION.

Before Mr. Justice Chitty and Mr. Justice Walsmsley.

MAHABIR THAKUR

v.

THE KING-EMPEROR*

AND

RANKUMAR PATIAIK

v.

THE KING-EMPEROR.*

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February 18, 23.

Certificate—Indian Penal Code (Act XLV of 1860), Secs. 197, 198—Civil Procedure Code (Act V of 1908), O. 21 R. 2—‘Certify’—Decree-holder, if to certify payment—Decree-holder, statement of, if admissible as such a certificate.

A, purporting to represent a decree-holder in a certain suit, signed and filed a petition in the Court, stating, contrary to the fact, that B, the judgment-debtor, had paid off the decretal amount to the decree-holder through him, her ammukteer. B, was found to have abetted A in so doing :

Held, that A was not guilty of offences under Secs. 197 and 198 of the Indian Penal Code and B could not be convicted for abetting.

The certificate, in respect of which a man may be punished under Secs. 197 and 198 of the Indian Penal Code, if it is false to his knowledge or belief, must be either (a) one that is required by law to be given or signed, or (b) that relates to any fact of which such certificate is by law admissible in evidence. One or other of these requirements must be fulfilled before a man can be dealt with under these sections.

A decree-holder is not bound to certify in writing a payment or adjustment of his decree. It may be done orally either by himself or any person who can properly represent him. There is no provision of law which requires him so to certify by “issuing or signing a certificate.”

A statement of the decree-holder or his agent as to payment or satisfaction is not admissible in evidence as such a certificate, that is, without further proof.

The word ‘certify’ in O. 21 R. 2 of the Code of Civil Procedure means primarily to assure, to vouch, to make certain. Every act of certifying does not necessarily result in a ‘certificate,’ meaning thereby a signed document vouching a particular fact. The word ‘certificate’ may be used as synonymous with ‘certification’ but that is not its meaning in Secs. 197 and 198 of the Indian Penal Code.

Applications for Revision by the Accused.

Petitions under section 435 of the Code of Criminal Procedure.

One Mahes Babu died leaving three sons and a widowed daughter-in-law, Musammut Sabitri Debi. They inherited the deceased’s

* Criminal Revision Nos. 95 and 122 of 1919, against the orders of convictions and sentences passed by R. Sheepshanks Esq., Sessions Judge of Muzafferpur, dated the 17th January, 1915, affirming those of Syed Izhar Hossain, Deputy Magistrate of Muzafferpur, dated 30th November, 1915.

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property in equal shares. In 1902 these 4 co-sharers executed an *ammukteernama* whereby the accused Ramkumar Patlaik and some other gentlemen were appointed as their *ammukteers*. Sabitri Debi afterwards in 1904 and 1909 appointed separate *ammukteers* of her own. She leased out her properties to the accused Mahabir Thakur (1). For non-payment of rent, a suit was instituted by Sabitri Debi, which resulted in a decree for Rs. 3,137 and odd in her favour. The leasehold property was advertised for sale and 15th July 1915 was fixed for sale. On the 14th July 1915 Ramkumar Patlaik filed a petition under order 21, rule 2 of the Code of Civil Procedure, certifying satisfaction of the decree. The material portion of the petition was as follows :

"Whereas in execution of decree for Rs. 3,137-0-9 p. the property of the judgment-debtor has been advertised for sale on the 15th July, 1915, and whereas the judgment-debtor comes to me, the decree-holder, at Begonia, and after settlement of accounts paid the full decretal amount through my mukteer, one Babu Ramkumar Patlaik, and whereas a receipt for the decretal amount has been given to the judgment-debtor under the signature of the said mukteer-am and the judgment-debtor has been told that petition of satisfaction will be filed in Court on the date fixed, accordingly this petition is filed and case may be shown as satisfied."

At the bottom of this petition on the left side, the name of Sabitri Debi was written in Hindi and on the right hand side Ramkumar Patlaik made an endorsement in Bengali to the effect that "he had received Rs. 3,137-0-9 p. as an *ammukteer* of Sabitri Debi."

On the 15th July 1915, the decree-holder filed a petition denying her receipt of decretal amount and that Ramkumar Patlaik was her *ammukteer*. The Subordinate Judge thereupon dismissed the application to enter satisfaction holding that the petition for satisfaction was false and forged and sanctioned the prosecution of Ramkumar Patlaik for giving false evidence and filing a false petition of satisfaction in his Court. On a complaint by one Mahomed Alum, *ammukteer* of Sabitri Debi, Ramkumar Patlaik was placed upon his trial on charges under sections 197 and 198 I. P. C. and Mahabir Thakur, on charges under sections $\frac{1}{10}$ and $\frac{1}{10}$ I. P. C., for aiding and abetting Ramkumar. The learned Deputy Magistrate, who tried the cases, convicted them under the said sections, and sentenced them to one year's rigorous imprisonment. These convictions and sentences were confirmed by the learned Sessions Judge on appeal. In his judgment he observed as follows :

"It is argued that the certificate given and used in this case is

not such a certificate as is contemplated by those sections (i. e., sections 197 and 198 I. P. C.), the construction of which should be limited to public documents. There is nothing in the wording of the sections to justify any such limitation. Certificates of satisfaction are required to be given by order 21, rule 2, Civil Procedure Code and it is certain that they are admissible in evidence. I am quite unable to limit this latter expression to the meaning given it by the learned pleader for the appellant, namely, a certificate which proves itself. The expression must be construed in its ordinary legal sense, with which the draftsman of the Code must be assumed to have been conversant. If any such limitation, as that suggested, had been intended it would have been expressed in the Code."

Both Ramkumar and Mahabir thereupon moved the High Court.

Mr. Jason (with him *Babus Dasarathi Sanyal*, *Chandra Sekhar Banerjee* and *Debendra Narain Bhattacharjee*) for the Petitioner in Rule No. 95.

Sir S. P. Sinha, *Babus Sajani Kanta Sinha* and *Gopendra Nath Dass* for the Petitioner in Rule No. 122.

Babus Aghore Nath Chatterjee and *Atul Krishna Roy* for the Opposite Party.

Mr. Sultan Ahmed for the Crown.

Mr. Sultan Ahmed for the Crown: O. 21, R. 2 of the Code of Civil Procedure requires a certificate under cl. (1) by decree-holder and under cl. (2) by the Court. A mere oral declaration is not sufficient. Referred to *Saadoolah Shaikh v. Kulee Churn* (1). Even if oral declaration be sufficient, when a written certificate was given, it comes within the second part of Sec. 197 I. P. C. viz., a certificate which is by law admissible as proof of the fact certified to. Referred to annotation in S. 197 I. P. C. in Ratanlal's Law of Crimes.

Mr. Jackson in reply: There is no mention of 'certificate' in O. 21, R. 2, whereas in the same order rules 83, 94 and 95, the word is specifically mentioned. The word 'certify' means 'notify.' Referred to Wharton's Law Lexicon where 'certificate' is defined as a 'testimony in writing.' A 'certificate' to come within S. 197 I. P. C. must come within both the parts of that section and reference was made to the expression 'such certificate' in the latter part of that section. Gour's Penal Code, annotation to S. 197 referred to.

Sir S. P. Sinha adopted the argument of *Mr. Jason* but submitted that the document must satisfy either one or the other part but

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need not satisfy both and that the latter part of the Sec. 197 refers only to official or quasi-official certificates. The expression 'by law' in the section evidently connotes that the document must prove itself under some specific provision of some statute—a document, which, to become admissible, must be proved by other evidence, is not within the section.

C. A. V.

The judgment of the Court was as follows :

February, 23.

These two cases arise out of the same trial and may be conveniently disposed of together. The petitioners Ramkumar Patlaik and Mahabir Thakur were convicted under sections 197 and 198 and sections $\frac{1}{10}$ and $\frac{1}{10}$ respectively and sentenced each to one year's rigorous imprisonment under each section, the sentences to run concurrently. The finding, which, for the present purpose, we may assume to be correct, was that Ramkumar, purporting to represent the decree-holder in a certain suit, signed and filed a petition in the Court of the Sub-Judge, stating, contrary to the fact, that Mahabir Thakur, the judgment-debtor, had paid off the decretal amount to the decree-holder through him, her ammuksar. Mahabir Thakur was found to have abetted Ramkumar in so doing.

The question on these Rules is whether the signed petition of Ramkumar was a 'certificate' within the purview of sections 197 and 198. Both the Courts below have held that it was, but we find ourselves unable to agree with them. The mistake appears to have arisen from a careless reading of order XXI, rule 2 of the C. P. C. and a misappreciation of the meaning of the word "certify" there used. The learned Sessions Judge says "certificates of satisfaction are required to be given by O. XXI, R. 2 C. P. C. and it is certain that they are admissible in evidence." A perusal of the rule shows that the word 'certificate' finds no place there. The word "certify" means primarily to assure, to vouch, to make certain. Every act of certifying does not necessarily result in a "certificate," meaning thereby a signed document vouching a particular fact. The word "certificate" may no doubt be used as synonymous with "certification" [see *Saadullah Shaikh v. Kalee Churn* (1)], but that is clearly not its meaning in sections 197 and 198 I P. C. The decree-holder is not bound to certify in writing a payment or adjustment of his decree. It may be done orally, either by himself or any person who can properly represent him. We know of no provision of law which requires him so to certify by "issuing or signing a certificate."

Turning then to sections 197 and 198 what do we find? The

certificate, in respect of which a man may be punished, if it is false to his knowledge or belief, must be either (1) one that is required by law to be given or signed or (2) that relates to any fact of which such certificate is by law admissible in evidence. One or other of these requirements must be fulfilled before a man can be dealt with under these sections. Neither requirement has been fulfilled in this case. There is, as above stated, no provision of law which requires a decree-holder or his agent to give or sign a certificate of payment or adjustment. Nor is there any provision of law which makes the statement of the decree-holder or his agent as to payment or satisfaction admissible in evidence as such a certificate, that is without further proof. The statement may, no doubt, be proved against him, but that is not what the section says. Various instances are given in the text books of the class of certificates contemplated by these sections. We need not enumerate them here. They are no doubt for the most part official, or quasi-official certificates, certificates to be given by officials or others, as prescribed in various statutes. There is however no particular limitation to the character of the certificate meant, except that which we find in section 197 itself. It must fulfil one of the requirements there set out. If it does not, a man cannot be punished under these sections in respect of it.

In this view of the matter, the convictions on the petitioners cannot stand. We need not at present express any opinion on the further question whether the act of Ramkumar brings him within the mischief of some other section or sections of the I. P. C.; whether he has possibly committed some other offence. Nor need we consider whether or not Mahabir Thakur has abetted him in so doing. The Rules are made absolute, the convictions and sentences on the petitioners are set aside. Their bail bonds will be discharged.

A. J. M.

Rules made absolute :

Convictions and sentences set aside.

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APPELLATE CIVIL.

Before Mr. Justice D. Chatterjee and Mr. Justice Chapman.

KESHAB CHANDRA PRAMANICK

v.

AJAHAR ALI BISWAS.*

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1914.

December, 15, 22.

Civil Procedure Code (Act V of 1908), section 60—"Saleable," meaning of.

The word 'saleable' in section 60 of the Code of Civil Procedure means saleable by auction at a compulsory sale under the order of the Court, and not transferable by act of parties.

Golaknath Roy Chowdhry v. Mathura Nath Roy Chowdhry (1) followed.

Vyankatraya v. Shivarambhat (2) referred to.

Appeal by the Judgment-debtor.

Application for execution of a decree.

A piece of land and the huts standing thereon belonging to the judgment-debtor were attached in execution of a decree obtained by the decree-holder respondent. The judgment-debtor filed objections to the effect that the land was not saleable, and the huts were also exempt from sale as they were occupied by an agriculturist as such.

It appeared that the judgment-debtor held the land under a permanent lease, and there was a condition in the lease that if he made any transfer thereof the landlord would re-enter.

The Court of first instance gave effect to the objections of the judgment-debtor. On appeal the learned District Judge reversed the decision of the first Court.

Against that decision the judgment-debtor appealed to the High Court.

Babu Surendra Kumar Bose for the Appellant.

Babu Ambikapada Chaudhuri for the Respondent.

C. A. V.

The judgment of the Court was as follows :

December, 22.

The appellant held a permanent lease of some lands on which he had his huts : there was a condition however in his lease that if he made any transfer of the lands the landlord would re-enter. The respondent having attached this land and the huts the appellant objected that the land was not saleable and the huts were exempt

* Appeal from Appellate Order, No. 318 of 1913, against the order of S. C. Mullick, Esq., District Judge of Nadia, dated the 13th May, 1913, reversing the order of Balu Kumud Nath Ray, Munsiff of Chuadanga, dated the 13th of January, 1913.

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from sale as being huts occupied by an agriculturist as such. The Court of first instance upheld these objections but the lower appellate Court repelled them holding that the condition in the lease did not prevent a compulsory sale by the Court and the huts were not occupied by an agriculturist as such. The present appeal is against that decision.

It is contended that under Sec. 60 of the Civil Procedure Code such lands only can be sold as are saleable and belong to the judgment-debtor and as the judgment-debtor could not sell the lands the Court cannot sell the same. This argument is based on a misapprehension of the word "saleable" used in the section. The word evidently means saleable by auction at a compulsory sale under the order of the Court and not transferable by act of parties. The lease in this case forbade a sale by the tenant but did not prevent a sale by the Court. This view is in accord with the opinion expressed in the case of *Golakhnath v. Mathura Nath* (1) and we have no reason to differ from the same. The landlord might perhaps have imposed on the holding an immunity from Court sales as was done in the case of *Vyankatraya v. Shivarambhat* (2) but he did not and the tenant has no right to complain. The first ground therefore fails.

The reasoning upon which the learned District Judge holds that the appellant is not an agriculturist may not be sound and is certainly open to criticism but it is a finding of fact with which we cannot interfere.

The appeal therefore must be dismissed and we dismiss it with costs 1 gold mohur.

A. N. R. C.

Appeal dismissed.

(1) (1891) I. L. R. 20 Calc. 273.

(2) (1883) I. L. R. 7 Bom. 256.

*Before Sir Asutosh Mookerjee, Knight, Judge, and**Mr. Justice Beachcroft.*

HIRA LAL CHATTERJEE AND OTHERS

v.

GIRIBALA DEBI.*

CIVIL.

1915

July, 22.

Pleadings and proof, variance between, when fatal—Objection, form of.

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.

* Appeal from Appellate Decree No. 2471 of 1914, against the decree of Babu Mohim Chunder Chakrabarti, Subordinate Judge of Dacca, dated the 29th July, 1914, affirming that of Babu Rash B. Hari Mookerjee, Munsiff of Munsiganj, dated the 29th September, 1913.

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Eshenchunder v. Shamachurn (1); *Mylapore Iyanumy v. Yeo Kay* (2); and *Shivabasava v. Sangappa* (3) referred to.

The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, *first*, to apprise the defendant, distinctly and specifically, of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise; and, *secondly*, to preserve the accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. Hence every variance between pleading and proof is not fatal.

Nabadipendra v. Madhusudan (4) followed.

The objection that the plaintiff should not be allowed to succeed on a case different from what he had set out in his plaint, should be one of substance and not one of form.

Radha Mohun v. Jadoomonee (5) referred to.

Appeal by the Defendants.

Suit for recovery of possession of land on declaration of title.

The material facts and arguments appear from the judgment.

Babu Rajendra Chunder Guha (for *Babu Brojendra Nath Chuckerbutty*) for the Appellants.

Babu Chandra Sekhar Sen for the Respondent.

The judgment of the Court was delivered by

July, 22.

Mookerjee, J.—This is an appeal by the defendants in a suit for recovery of possession of land on declaration of title. The plaintiff claims one-third share in the disputed property by right of inheritance from her husband. The Courts below have found that she is entitled only to one-half of what she claims and have made a decree accordingly. The defendants contend that there is a variance between pleading and proof and that the plaintiff should not be allowed to succeed on a case different from what she made in her plaint. To appreciate the force of this objection, it is necessary to bear in mind that although in the Court of first instance, the plaintiff claimed only one-third share, and it was consequently unnecessary for her to deal with the devolution of the other share, yet she went on to state that another one-third share belonged to Durga Charan and the remaining one-third share to Kalinath. The defendants did not dispute these latter allegations; in fact, they claim to have purchased the share of Durga Charan. Consequently, the

(1) (1866) 11 M. I. A. 7; 6 W. R. P. C. 57.

(2) (1887) 1 L. R. 14 Calc. 801; L. R. 14 I. A. 168.

(3) (1904) 8 C. W. N. 865; L. R. 29 Bom. 1.

(4) (1912) 18 C. W. N. 473.

(5) (1875) 23 W. R. 369 P. C.

contest in the trial Court upon the pleadings was, whether Mahesh, the husband of the plaintiff, or Kalikumar, the father of the defendants, was entitled to one-third share of the property. The Court found that Kalinath was entitled to one-third share; upon this point both parties were agreed. The Court also found that Kalikumar, the father of the defendants, was entitled to another one-third share. As regards the remaining one-third share, the Court held that it was jointly owned by Durga Charan and Mahesh. On this basis, the Court made a decree for one-sixth share in favour of the plaintiff. This decree was challenged before the lower appellate Court, on the ground, amongst others, that the plaintiff had been allowed to succeed on a case different from what she had set out in her plaint. This objection was overruled by the Subordinate Judge, who held on the merits that the view taken by the trial Court was supported by the evidence on the record. On the present appeal, the contention has been reiterated that the suit should be dismissed, because the decree is contrary to the allegations in the plaint. It may be conceded, as was stated by Lord Westbury in the case of *Eshenchunder v. Shamachurn Bhutto* (1) and by Sir Barnes Peacock in *Mylapore Iyasawmy Moodliar v. Yeokay* (2) that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. This principle was recently confirmed by the Judicial Committee in the case of *Shivabasava Kom Amingavda v. Sangappa Bin* (3). But in the application of this doctrine, we must bear in mind the reasons whereon it is founded. As explained in *Nabadipendra v. Madhusudan* (4), the rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, *first*, to apprise the defendant, distinctly and specifically, of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise; and, *secondly*, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. We cannot consequently hold that every variance between pleading and proof is fatal; we must carefully consider, whether, in the words of the Judicial Committee in the case of *Radha Mohun v. Jadomonee Dossee* (5), the objection is one of form or of substance. In that case, the Court of first instance dismissed the

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(1) (1866) 11 M. I. A. 7; 6 W. R. P. C. 57.

(2) (1887) I. L. R. 14 Calc. 801; I. L. R. 14 I. A. 168.

(3) (1904) 8 C. W. N. 865, I. L. R. 29 Bom. 1.

(4) (1912) 18 C. W. N. 473.

(5) (1875) 23 W. R. 369.

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suit for possession of property on the ground that the Hindu widow who had instituted it had established a title different from what she had alleged in the plaint. This Court on appeal reversed the decision and the view of this Court was ultimately approved by the Judicial Committee. In the case before us, it was essential for the plaintiff to state that her husband was entitled to a share in the disputed property and that she had succeeded to that share by inheritance. It was not necessary for her to deal with the devolution of the other shares. Consequently, the allegations made in the plaint with respect to those shares were not essential for the purposes of the pleadings. It is further clear that the defendants were not taken by surprise. Evidence was adduced by both the parties in support of their respective cases, to show how the title to the different shares had devolved from time to time. The Court came to the conclusion upon the entire evidence, that the allegations of the plaintiff as also of the defendants were incorrect, and, as happens not infrequently the truth lay midway; the plaintiff was entitled only to one-half of what she claimed. It is further clear that, as the trial Court stated, the evidence incontestably proves that the husband of the plaintiff had a share in the disputed property. In these circumstances, we are of opinion that we should not give effect to the objection taken by the appellants, namely, that relief must be refused to the plaintiff because she has not made out the precise title set up by her in the plaint in respect of the shares wherewith she had no concern. The view we take is in accord with two Full Bench decisions of the Allahabad High Court: *Balmakund v. Dalu* (1); *Abdul Ghani v. Musammat Babni* (2).

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1903) I. L. R. 25 All. 478.

(2) (1902) I. L. R. 25 All. 256.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
'Mr. Justice Newbould.*

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1915.

August, 5, 6.

KRISHNA CHANDRA CHAUDHURI AND ANOTHER

v.

RATAN RAM PAI AND OTHERS.*

Guardian—Alienation of ward's property, when can be made—Need—Benefit of estate.

* Appeals from Appellate Decrees Nos. 2021 and 3306 of 1912, against the decisions of H. P. Mookerjee Esq., District Judge of Sylhet, dated the 14th April, 1914, affirming those of Babu Nagendra Nath Bose, Munsiff of Habiganj, dated the 28th May, 1913.

The power of the manager for an infant heir to charge an estate not his own is under the Hindu Law a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. But when, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. There is a distinction between a case of need and a case of benefit of the estate. The actual pressure on the estate, the danger to be averted, refer to a case of need, and the benefit to be conferred upon the estate in the particular instance is thus differentiated from the other category mentioned. The mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular transaction is "for the benefit of the estate."

Hunoomanpersaud v. Mussumat Babooee Munraj (1); *Radha Pershad v. Mussumat Talook* (2); *Kaihur v. Roop Singh* (3) and *Ganap v. Subbi* (4) referred to.

A party filling a fiduciary character, like that of a guardian, is authorised to perform any act which is manifestly for the infant's benefit.

Appeal by the Plaintiffs.

Suit for recovery of possession of shares of an estate on declarations of title by purchase.

The material facts and arguments appear from the judgment.

Babu Gopal Chandra Das for the Appellants.

Babus Dwarka Nath Chuckerbutty and *Kalikinkar Chuckerbutty* for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the plaintiff in a suit for recovery of possession of a share of an estate on declaration of title by purchase. The share in dispute admittedly belonged originally to one Harendra Chandra Chukrabarty who attained his majority on the 21st September 1908. During his minority, there was a scramble for acquisition of this share by two sets of persons, who may be called the Pals and the Chowdhurys. On the 19th March 1907, the Chowdhurys took a conveyance from the infant. On the 15th April 1907, the Pals took another conveyance of the same share from Sarat Chandra Chukrabarty the father of the infant, who was the *de facto* guardian and manager of his properties. On the 18th December 1909, the Chowdhurys took a second conveyance from Harendra with a view to fortify their title which was obviously

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(1) (1856) 6 M. I. A. 393 (423).

(2) (1873) 20 W. R. 38.

(3) (1871) 3 N. W. P. H. C. R. 4.

(4) (1908) I. L. R. 32 Bom. 577.

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open to attack as based on a conveyance executed by an infant. On the 1st August 1912 the Chowdhurys commenced this action for 'declaration of title and recovery of possession, as the Pals had, on the 15th April 1912, instituted a suit for rent on the assumption that they had acquired a valid title by their purchase. The Court of first instance made a conditional decree in favour of the Chowdhurys for recovery of possession upon payment of Rs. 700 to the Pals, which represented the consideration paid by the latter to the vendor. On appeal, the District Judge has reversed this decision and has dismissed the suit. He has held that the conveyance by the guardian of the infant, executed on the 15th April 1907, is binding upon the latter and that there was consequently no subsisting title left in him capable of transfer to the Chowdhurys under the conveyance of the 18th December 1909. The District Judge has further found that as the share in dispute was infinitesimal and constituted an inconvenient and expensive property the sale by the guardian was the act of a prudent person. On the present appeal, the decree of the District Judge has been assailed substantially on the ground that the sale by the guardian was not necessary and cannot be held operative against the infant, merely because it was beneficial to him. In our opinion, this contention cannot be sustained.

The power of the manager of an infant heir was defined by the Judicial Committee in the well-known case of *Hunoomanpersaud Panday v. Mussumat Babooe Munraj Koonwaree* (1). Knight Bruce, J., observed that the power of the manager for an infant heir to charge an estate not his own is under the Hindu Law a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate; the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. It is plain that in this passage a distinction is drawn between a case of need and a case of benefit of the estate. The actual pressure on the estate the danger to be averted, refer to a case of need; and the benefit to be conferred upon the estate in the particular instance is thus differentiated from the other category mentioned. This view has been adopted and applied by the Indian Courts ever since the decision of the Judicial Committee was pronounced on the 26th July 1856. In the decision of a Full Bench of the Sudder

(1) (1856) 6 M. I. A. 393 (423).

Court in the case of *Gooroo Prosad Jena v. Mudden Mohan Soor* (1) where the judgment was pronounced on the 11th December 1856, apparently before the decision of the Judicial Committee reached this country, the same view was independently taken, and it was held that the benefit of the minor creating necessity was a test by which the legality of the transaction must be tried; the rule is that a party filling a fiduciary character, like that of a guardian, is authorised to perform any act which is manifestly for the infant's benefit. A similar view was adopted in *Mohanund Mondul v. Nisur Mondul* (2), where Maclean C. J. and Banerjee J. held that a *defacto* manager of an infant's estate has, in case of necessity or for the benefit of the minor, power to sell his property. In that case the Court further declined to accept the contention that the rule laid down by the Judicial Committee was restricted to cases of mortgage or other forms of partial alienation and was not intended to apply to cases of sale.

Our attention has, however, been drawn to a passage from the standard treatise on the Law of Minors by Sir Ernest Trevelyan (4th Ed. page 154) where that learned author states that there is no case where the sale of a minor's property has been upheld, except on the ground of its being justified by the necessities of the minor or of his estate. The accuracy of this statement need not be disputed. But this does not show that the rule is restricted in its application to cases of necessity alone; the absence of judicial authority may be due to the circumstance that the point has not been regarded as open to serious argument. But, it must be remembered that mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular transaction is "for the benefit of the estate" within the meaning of the rule, which could hardly have been intended to include cases of speculative development of estates of minors: *Radha Pershad Singh v. Mussamut Talook Raj Koor* (3) *Raihur Singh v. Roop Singh* (4); *Ganap v. Subbi* (5). In the case before us there is no room for controversy, that the alienation was for the benefit of the estate and was such as a prudent owner of the estate might have made. In these circumstances it follows that the transaction was binding upon the estate of the infants and that it was not open to him after he had attained his majority to create a

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(1) (1856) Beng. S. D. A. 980.

(2) (1899) I. L. R. 26 Cal. 820.

(3) (1873) 20 W. R. 38.

(4) (1871) 3 N. W. P. H. C. R. 4.

(5) (1908) I. L. R. 32 Bom. 577.

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valid title by his conveyance in favour of the Chowdhuri's on the 18th December, 1909.

We have finally been invited to make some provision in the decree for recovery of the purchase-money paid by the Chowdhuri's to Harendra on the 19th March, 1907. But there are two insuperable difficulties in the way of the appellants. In the first place, there was no such claim made against Harendra in either of the Courts below, and, as he is not represented in this Court, it would not be right, to make a decree against him on the ground suggested. In the second place, the money is alleged to have been paid to Harendra while he was still an infant; if a claim were now put forward against Harendra for recovery of such sum, defences might be available to him which have not been investigated in this case. Whatever remedy the Chowdhuri's may have against Harendra, must consequently be enforced in a suit properly framed for the purpose.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

In view of our decision in this appeal the other appeal (S.A. 3306 of 1912) also will stand dismissed with costs.

A. T. M.

Appeals dismissed.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice N. R. Chatterjee.*

CHATTERJEE BRAHMIN

v.

DURGADUTT AGARWALLA AND OTHERS.*

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August, 23.

Suit, maintainability of—Summons, non-service of, effect of—Personal judgment against defendant, if can be set aside—Civil Procedure Code (Act V of 1908), O. 9, R. 5—Decree indivisible—Effect of order setting aside decree on prior suit.

The law never acts by stealth, it condemns no one unheard, so that a personal judgment rendered against a defendant without notice to him or an appearance by him, is vitiated by the same infirmity as a judgment without jurisdiction. A judgment made under such circumstances may be set aside on the ground that the defendant must in essence be a party to the suit before the plaintiff can have judgment against him.

* Appeal from Original Decree No. 18 of 1914, against the decree of W. E. Parry Esq., Subordinate Judge of Dibrugarh, dated the 24th September, 1913.

The first three defendants in the present suit, instituted a suit against the present plaintiff and the fourth defendant for dissolution of partnership, for adjustment of accounts, for appointment of a receiver and for other incidental reliefs. At that time the plaintiff, who was then the second defendant, was resident beyond the limits of British India, namely, at Somaser in Rajputana. The summons was sent to the Political agent at Rajputana. No attempt was made by him to serve the defendant, but the summons was returned to the Court. A decree was passed in that suit directing both the defendants to pay the plaintiff a certain sum with costs by six monthly instalments on the dates specified, subject to the proviso that if default was made in the payment of a single instalment, the plaintiffs would be at liberty to enforce the entire decree by execution :

Held, that the plaintiff's position in that suit in substance was the same as if no summons had ever been issued for service. Under these circumstances, a decree made against him could not bind him. That as the decree was indivisible and could not be set aside in part, the whole decree was set aside. The effect of the order was to discharge the entire decree in that suit and to revive it for retrial. That as the second defendant (that is, the present plaintiff) was not served, he would have to be served, unless he chose to enter appearance voluntarily.

Appeal by the Plaintiff.

Suit to set aside decree.

The material facts and arguments appear from the judgment.

Babu Bhupendra Kumar Ghose for the Appellant.

Babu Nanda Lal Banerjee for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J. - This is an appeal by the plaintiff in a suit to set aside what has been described as an *ex parte* decree. The circumstances under which the decree in question was obtained against the plaintiff are beyond controversy. The first three defendants had a six annas share in a partnership business under a deed dated the 21st April 1909, while the plaintiff and the fourth defendant who are relations had each a five annas share. On the 24th May 1912, the first three defendants, who were, at the time, infants, instituted a suit against the plaintiff and the fourth defendant for dissolution of partnership, for adjustment of accounts, for appointment of a Receiver and for other incidental reliefs. The claim was valued at Rs. 22,000. At that time, the plaintiff, who was then the second defendant, was stated on the face of the plaint to be resident beyond the limits of British India, namely, at Somaser in Rajputana. The fourth defendant, who was the first defendant in that suit, was a resident of the place where the suit was instituted. On the day the plaint was filed, an application

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was made by the then plaintiffs for the issue of a warrant for arrest of the then first defendant and a warrant for attachment, before judgment, of all the partnership assets. The Subordinate Judge directed the issue of the warrants, ordered summonses to issue, and fixed the 10th June 1912 for the trial of the suit. The warrants of arrest and attachment were issued forthwith. The summons upon the second defendant which was issued on the day following, reached the Political Agent at Rajputana on or about the 1st June 1912, and was returned by him to the Court with the remark that it was impossible to serve the summons upon the defendant in time, as the date fixed for hearing the case was too close at hand; at the same time a request was made by him that a more distant date might be fixed; the date suggested was six weeks from the 1st June. Before the summons so returned had reached the Court of the Subordinate Judge, the proceedings had however been pushed on behalf of the plaintiffs with extreme rapidity. We find it noted in the order sheet that on the 27th May, that is, within three days of the institution of the suit, the first defendant had been arrested, and had received intimation from the Court that unless he furnished security for Rs. 15,000, he would be forthwith sent to the civil jail. On the 30th May, we find that the suit had been compromised. The first defendant had paid to the plaintiffs Rs. 13,000 and had agreed to pay Rs. 5,800 in specified instalments. A decree was made on these terms and the first defendant was released from arrest. Whether a decree obtained by consent under the circumstances described would be operative against the person who had consented thereto, is a question which does not directly arise for consideration in the present appeal; but we have to determine whether such decree is binding upon the other defendant to the suit who was absent in Rajputana.

It appears from the petition of compromise that the first defendant entered into the settlement both for himself and his absent partner. He professed to represent his partner on the basis of a power of attorney to which reference will presently be made. The decree, however, does not mention the petition of compromise, and does not even recite that it was made by consent; but it directs both the defendants to pay the plaintiff the sum of Rs. 5,800 with costs by six monthly instalments on the dates specified, subject to the proviso that if default was made in the payment of a single instalment, the plaintiffs would be at liberty to enforce the entire decree by execution. The decree, consequently, on the face of it, binds both the then defendants. The plaintiff was thus driven to

institute this suit on the 8th October 1912 to set aside this decree. His contention is that he is not bound by this decree ; *first*, because he was in essence not a party to the suit and the Court had no jurisdiction to make a decree against him ; and, secondly, because, his partner had no authority to bind him by a compromise. In our opinion, these contentions are well-founded and must prevail.

As regards the first ground, it is plain that this is in no sense a case of an *ex parte* decree. The Code contemplates service of summons upon the party sought to be made liable. That summons may be duly served or may not be duly served. But the Code does not contemplate the contingency which has happened in this case. The plaintiffs took out summons upon the second defendant in the suit. The summons was sent, as stated, to the Political Agent at Rajputana. No attempt was made by him, rightly or wrongly, to serve the defendant, but the summons was returned to the Court. The position in substance is the same as if no summons had ever been issued for service on the defendant. Under these circumstances a decree made against the defendant cannot possibly bind him.

Order 9, rule 5 of the Civil Procedure Code clearly contemplates that where the summons has been returned unserved the plaintiff must within a year from the prescribed date apply for the issue of a fresh summons ; if he fails to do so the suit is liable to be dismissed. The Code obviously does not contemplate the trial of a suit when the summons has been returned unserved. It is obviously just that a man should have notice of any legal proceeding that may be taken against him and a full and fair opportunity to make his defence. As has been well said, the law never acts by stealth, it condemns no one unheard, so that a personal judgment rendered against a defendant without notice to him or an appearance by him, is vitiated by the same infirmity as a judgment without jurisdiction. A judgment made under such circumstances may be set aside on the ground that the defendant must in essence be a party to the suit before the plaintiff can have judgment against him.

As regards the second ground, it is equally plain that the decree cannot be sustained. An extract from the power of attorney dated the 22nd June 1909 is on the record. Thereby the plaintiff authorised his partner to manage the partnership business, to continue, institute, prosecute, defend or oppose, as the case might be, all the suits that were or might be brought by or against the executant in respect of his business and property. On behalf of

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the plaintiffs respondents no endeavour has been made to support the view that the compromise of a suit can by any stretch of language be included within any of the terms of the power of attorney. It is plain beyond controversy that the partner of the plaintiff had no authority to bind him by the compromise.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit decreed. The decree in suit 10 of 1912 is set aside, not only in so far as the plaintiff is concerned but also with regard to the fourth defendant, because the decree, on the face of it, is indivisible and cannot be set aside in part. The question arises, in these circumstances, what is the effect of our order upon the prior suit. The effect is obviously to discharge the entire decree in that suit and to revive it for retrial: *Khajooroonissa v. Rowshan Jehan* (1); *Gordon v. Lennox* (2); *Bibee Solomon v. Abdool Azeez* (3); *Sarat Chunder v. Kartik Chunder* (4), *Sarbesb Chandra v. Khetra Pal* (5); *Rajkumar v. Harekrishna* (6), though there are expressions to the contrary effect in *Bhimaji v. Rakmabai* (7) and *Khettra Mohan v. Mangobinda* (8). As the then second defendant was not served, he will have to be served, unless he chooses to enter appearance voluntarily. The appellant is entitled to his costs both here and in the Court below; but although the appeal is valued at Rs. 18,000, we assess the hearing fee in this Court at five gold mohurs, as the arguments for the respondents have not been unduly protracted.

A. T. M.

Appeal allowed.

(1) (1876) I. L. R. 2 Calc. 184 (1911); L. R. 3 I. A. 291.

(2) (1902) App. Cas. 465.

(3) (1881) I. L. R. 6 Calc. 687.

(4) (1883) I. L. R. 9 Calc. 810.

(5) (1910) 11 C. L. J. 346.

(6) (1910) 15 C. L. J. 217.

(7) (1885) I. L. R. 10 Bom. 338.

(8) (1910) 14 C. W. N. 558.

*Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice
N. R. Chatterjee.*

GOBIND RANI DASÍ

v.

BRINDA RANI DASÍ AND OTHERS.*

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August, 27.

Receiver—Mortgage, suit by—Court's duty—Hindu widow—Reversioner—Provisional appointment.

* Appeal from Order No. 290 of 1915, against the order of Babu Behari Lal Chatterjee, Subordinate Judge of Dacca, dated the 16th and 17th June, 1915.

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When a mortgagee applies in his suit for appointment of a receiver, the primary question for consideration is, what steps should be taken to protect the mortgagee.

Under the circumstances of the case, the receiver was directed to take possession only in the event if the mortgagor fail to carry out the undertaking to deposit the Government revenue, instalment by instalment, at least 7 days before the date fixed for the payment thereof.

Appeal by the Defendant.

Application for appointment of a receiver by the mortgagee.

The application was supported by some of the defendants who at the instance of the mortgagee, had joined in the execution of the mortgage, as they were the presumptive reversioners to the estate which was granted by way of security by a Hindu widow in possession of the properties left by her husband. The Court below was satisfied that the mortgagor had wasted the property and appointed a receiver. The widow was found on one solitary occasion, failed to pay the Government revenue punctually.

Babu Surendra Nath Guhu for the Appellant.

Babus Dharendra Lal Khastgir, Joges Chunder Bose, Ambicapada Chowdhury and Prokash Chunder Pakrasi for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.—This appeal is directed against an order for the appointment of a Receiver in a mortgage suit. The application for the appointment of a receiver was made by the mortgagee. That application was supported by some of the defendants who at the instance of the mortgagees, had joined in the execution of the mortgage, as they were the presumptive reversioners to the estate, which was granted by way of security by a Hindu widow in possession of the properties left by her husband. These defendants, though responsible under the mortgage instrument for repayment of the loan have thus no present interest in the mortgaged property. The Court below was satisfied that the mortgagor had wasted the property and appointed a receiver. The Court, however, considered the matter, not so much from the point of view of the mortgagee as from that of the reversioners. This clearly was not the proper standpoint in the investigation of the case. When the mortgagee applies in his suit for the appointment of a receiver, the primary question for consideration is, what steps should be taken to protect the mortgagee. Here the reversioners defendants have taken advantage of the application by the mortgagee to secure a benefit to themselves, as if they themselves had instituted a suit

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to restrain the widow from improperly dealing with her husband's estate and had obtained an order for the appointment of a receiver for the protection of their contingent interest. This much, however, may be charged against the lady that she did, on one solitary occasion, fail to pay the Government revenue punctually. But an undertaking has been given in this Court that the Government revenue will in future be paid at least 7 days in advance of the date fixed for such payment, and the appellant has also agreed that in the event of default, the receiver will take possession of the mortgaged properties. She has given a further undertaking that she will not, during the pendency of the suit, alienate the mortgaged property without the leave of the Court. This entirely satisfies the mortgagee. But the reversioners have vehemently urged that the receiver should be retained. We are unable to accede to this prayer. The reversioners have resolutely attempted to divert these proceedings from their true purpose and to secure an advantage for themselves by no means within the scope of a mortgage suit. In our opinion, the objections taken by the reversioners are entirely groundless.

The result is that this appeal is allowed in part; while the order appointing the receiver is maintained, the order directing the receiver to take possession is cancelled. In lieu thereof we direct that the receiver do take possession, only if the appellant fails to carry out the undertaking to deposit the Government revenue, instalment by instalment at least 7 days before the date fixed for the payment thereof.

Let the order be sent down as early as possible.

A. T. M.

Appeal allowed in part.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.

MATHURA SUNDARI DASSI

v.

HARAN CHANDRA SHAHA AND OTHERS.*

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December, 10, 21.

Appeal—Letters Patent, Cl. 15—Order setting aside an order dismissing a suit—'Judgment'—Civil Procedure Code (Act V. of 1908), Sec. 104, O 9 R. 9, O. 43 R. 1 Cl. (c)—Grave error of judgment on the part of the counsel—Client, if to be penalised, and if so, to what extent.

Per curiam : An appeal lies against an order of a Judge on the Original Side of the High Court, refusing to set aside an order of dismissal of a suit made by him under Order 9, rule 8 of the Code of Civil Procedure.

Per Sanderson, C. J. and Mookerjee, J. : Such appeal lies under order 43, Rule 1 Cl. (c) of the Code of Civil Procedure.

Per Woodroffe, J. and Mookerjee, J.—Such appeal lies under clause 15 of the Letters Patent.

Per Mookerjee, J. : The appellant has to establish that he has a right of appeal.

Meenakshi v. Subramanya (1) followed.

The effect of section 104 of the Code of Civil Procedure is not to take away a right of appeal given by clause 15 of the Letters Patent, but to create a right of appeal in cases even where clause 15 is not applicable.

A client may be penalised for a grave error of judgment on the part of his counsel in so far as payment of costs is concerned, but not to the extent of dismissal of his claim without investigation.

Appeal by the Plaintiff.

On the 5th February, 1915, Mr. C. R. Das applied for short adjournment. The application was refused. Mr. Das thereupon stated that he had no instructions to proceed further with the suit. The suit was accordingly dismissed for default.

An application was then made under Order 9, rule 9 of the Code Civil Procedure for restoration which also was rejected. The plaintiff filed an appeal against the decree and order. A preliminary objection was taken to the competency of the appeal.

Messrs. S. R. Das, B. C. Mitter and N. Gossain for the Appellant.

Messrs. W. Jackson, N. Sarkar, N. Bhose, S. C. Bhur and M. N. Bose for the Respondents.

The judgments of the Court were as follows :

Sanderson, C. J.—With regard to the preliminary objection

December, 21.

* Appeal from Original Decree and Order No. 43 of 1915, against the decree and order of Mr. Justice Imam, sitting on the Original Side of the High Court, dated the 5th February, 1915.

(1) (1887) L. R. 14 I. A. 160 ; I. L. R. 11 Mad. 26.

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which was raised by Mr. Jackson, when that point was taken, the case was argued upon the assumption that the suit had been dismissed under order IX, rule 8 which deals with default of appearance, and, therefore, I propose, whatever may have been the real position to deal with the argument which was presented to us by the learned counsel upon the basis that the order by Mr. Justice Imam dismissing the suit was made under order IX, rule 8. That order was made on the 5th of February, 1915. Then an application was made on the 25th of March of this year to set aside that order of dismissal. That was heard by the learned Judge and was refused, and the plaintiff appealed from that order of refusal to restore the case and set aside the dismissal, and a preliminary point has been taken by the learned counsel for the defendant that no appeal lies from such an order.

It was argued by the learned counsel for the defendant, Mr. Jackson, *first*, that the order in question was not a 'judgment' within the meaning of clause 15 of the Letters Patent; and, *secondly*, that if it is not within clause 15 of the Letters Patent, the Civil Procedure Code has no application to an appeal from a Judge of the High Court to other Judges of that Court.

As to the first point, namely, whether the order in question was a 'judgment' within the meaning of clause 15, personally I should not have had much doubt or hesitation in holding that the order was a 'judgment' within the meaning of that clause if it had not been for some cases which were cited to us. It is quite true that the learned Judge had no discretion upon the question of the dismissal of the suit under order IX, rule 8. In fact, the rule expressly says, "Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court *shall* make an order that the suit be dismissed." The learned Judge has no option and under such circumstances he must dismiss the suit. But when the application to set aside that dismissal is made, in my opinion, the Judge has a discretion, and he must exercise his judgment on the materials before him. The question on which he has then to exercise his judgment and his judicial discretion may, as in this case be a matter of the great importance: It is no less than whether the plaintiff under the circumstances of the case shall be allowed to prosecute his suit or for all time be debarred from trying to enforce his claim. Clause 15 obviously refers to 'judgments', which in common parlance may be called *orders*. In my opinion, the decision so arrived at on such a question as above stated would be a 'judgment' within the meaning of the word

'judgment' in the Letters Patent. The judgments, however, in some of the cases which Mr. Jackson has cited to us throw some doubt upon the correctness of the above view. I do not refer to them all, though I have considered them: the most important are *Hurrish Chandra Chowdhry v. Kali Sundari Dabia* (1), and *Gobinda Lal Das v. Shiba Das Chatterjee* (2). I only pause to remark that the exact point which arises in this case has not been decided, as far as I know, in any reported case, and I am informed that many such appeals, as this, have been heard in the Court of appeal here, but it is said that in one unreported case the decision of this Court was that an appeal would not lie. The decision in the present case on the application of the plaintiff does in my opinion decide a question which affects the rights of the plaintiff. He alleges that he should be allowed to prosecute his claim. A refusal of the application debars him for all time. If he had put in a plaint which was ill framed and that had been struck out by the learned Judge, according to the decision in one of the cases, he would have a right of appeal within the very terms of the judgment in that case—that was an illustration in the case (1) in 10 Indian Appeals—yet when an order is made which debars his suit for all time, according to the argument of Mr. Jackson, he is not to have a right of appeal.

I should be very loth to hold that this order is not a 'judgment' within the meaning of the clause 15 of the Letters Patent, but it is not necessary in my judgment to give a definite opinion upon it, because I think, on the second point, the Code does give a right of appeal. By clause 44 of the Letters Patent it is provided as follows: "And we do further ordain and declare, that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations." By the terms of section 117, the Code is made applicable to the High Court, and order XLIII, rule 1 gives a right of appeal in the very case under discussion. But it is said that this Code and the rules made under it do not apply to an appeal from a learned Judge of the High Court. I cannot follow that argument. It is part of the defendant's case that order IX, rule 8 applies. That order is in effect a part of the Civil Procedure Code. It seems to me strange that the plaintiff should be subjected to order IX, rule 8 and be liable to have his suit dismissed for want of appearance, yet when he has had his suit dismissed under one of the rules of the Code and wants to call in aid

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(1) (1882) L. R. 10 I. A. 4.

(2) (1906) I. L. R. 33 Cal. 1323.

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another of the rules which—when his application for re-instatement has been refused—gives him a right of appeal against that refusal, he is met with the argument that he cannot call in aid that rule because there is no appeal from the learned Judge of the High Court under the Civil Procedure Code. I think this is not a true view or a reasonable construction to put upon the Code and the rules made under it. In my judgment, the Code and the rules do apply and the plaintiff has a right of appeal.

This case has given me a considerable amount of anxiety, and I think the safest thing for me to do, in giving judgment, having regard to the course which we intend to adopt is to say as little as possible about the case itself, on the merits or demerits of the case, because if I do say any thing, it may be taken to prejudice either the one side or the other. I have come to the conclusion that the safest course for this Court will be to order this suit to be re-entered—I am not grounding my judgment upon what happened before January or February this year, but I take a few facts, namely, that this case was fixed to be tried by Mr. Justice Imam on the 4th of February, that apparently according to the evidence which was before the Court on the 3rd, the plaintiff, the lady, who had been suffering to some extent from colic for sometime was taken worse; that on the 4th that matter was mentioned to the learned Judge, and that an application would be made for adjournment. When the case was called on the 5th what happened is shown by the entry in the learned Judge's note and is as follows: "Mr. Das withdraws from the case, that he has only instructions to apply for adjournment and he does not appear any more in the case." I do not know exactly what the position was as regards Mr. Das—unfortunately, he is not here to-day; he is out of Calcutta as I understand but having regard to the admission which has been made by the learned counsel for the appellant, Mr. S. R. Das, to the effect that the learned counsel who appeared in the Court below took a wrong course, it seems to me that we must conclude that he ought to have gone on with the case, when the learned Judge gave him an opportunity of calling his other witnesses, and if necessary asking for an adjournment in order that the plaintiff might be examined at a subsequent time. It is therefore admitted that the learned counsel made a mistake, in the course which he and his junior adopted. The only question is whether the plaintiff in consequence of that mistake is to be debarred for all time from prosecuting her suit. It is a suit for a large sum of money: there are serious issues in it, and I think that if I had been in the position of Mr. Justice Imam,

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I would have allowed the case to be re-entered upon terms : and, inasmuch as there is an appeal—(we have decided already that there is an appeal in a matter of this kind) I have to apply my mind and try to ascertain what I should have done, had I been in the position of Mr Justice Imam. In my judgment, this case should be re-entered and the condition of re-instatement are these : 'The plaintiff must pay the taxed costs of the defendants, viz.,—such costs as were thrown away by the case not proceeding on the day when it should have, and she must also pay the taxed costs of the defendants upon the application before Mr. Justice Imam for restoration, and also the taxed costs of the respondents in this appeal except for the first day which I think was occupied by the argument on the preliminary objection that there was no appeal, upon which question we have decided against the respondent. The plaintiff must pay such costs as I have intimated as a condition precedent to the case being re-entered : And, upon the point mentioned by Mr. Das, although at one stage of the proceedings there were only two sets of costs, still it seems to me that the defendants were entitled to appear here by separate counsel, and as regards this appeal there will be separate sets of costs as regards each defendant, who appeared.

Further, inasmuch as the taxation of costs may take sometime we think that the plaintiff ought to bring into Court within three weeks from this date the sum of Rupees two thousand, and it is to be clearly understood that the case will not be re-entered until the costs have been taxed and paid : they must be paid within one month from the certificate of costs. The appellant will have the costs of the first day of the appeal which was taken up in the preliminary point, and these costs will be set off, on taxation, against the costs which she will have to pay.

We direct that the taxation be expedited.

If the sum of Rs. 2,000 be not paid into Court and if the taxed costs payable by the appellant as aforesaid, after the taxation and the set off, be not paid by her within the time fixed, the case will not be restored, and in that event the appellant will be liable to pay the taxed costs of this appeal after the set off which has been allowed.

Woodroffe, J.—I need not in this case consider the question whether section 104 of the Civil Procedure Code touches the right of appeal given by the Letters Patent, for, if the order appealed from is a judgment within the meaning of the Letters Patent the question does not arise. It has doubtless been held that an order

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dismissing an appeal for default is not a judgment (see *Mansab Ali v. Nihal Chand* (1). But we are not concerned here with an order under order IX, rule 8 only but with an application for restoration under order IX, rule 9. Whether or not as a question of jurisdiction an appeal lies under clause 15 of the Letters Patent in a case in which an appeal is allowed under the Code. I think it may be said that there are *prima facie* grounds for holding that an appeal should be held to lie under the Letters Patent where it is allowed under the Code, for, the fact that the legislature has in the Code allowed an appeal in a particular case affords to my mind *prima facie* ground for supposing that, that case is of a class which this Court considers appealable under its Letters Patent. This Court has further held that we should not adopt a narrow construction [see *Mussamut Brij Coomaree v. Ramrick Dass* (2)]. Looking at the nature of the order appealed I think I should hold that it is appealable as a "judgment" under the Letters Patent. I do not consider the case reported in *Gobinda Lal v. Shiba Das* (3) which was on another section is any bar to my so holding.

On the facts of this appeal I have myself doubt whether we should allow it. But as my learned colleagues are prepared to give an indulgence to the plaintiff and that indulgence is to be on the term that all costs should be paid as condition precedent I do not dissent from the order proposed.

Moo' erjee, J.—This appeal is directed against an order under rule 9 of order IX, of the Civil Procedure Code, whereby Mr. Justice Imam has refused to set aside an order of dismissal of a suit made by him under rule 8.

As a preliminary objection has been taken to the competency of the appeal, it is incumbent upon the appellant to establish that she has a right of appeal [*Meenakshi v. Subramanya* (4)]; for as Lord B amwell said in *Sandbach v. North S. Ry Co.* (5), "an appeal does not exist in the nature of things; a right of appeal from any decision of any tribunal must be given by express enactment"—words quoted with approval by Lord Ma-naghten in *Rangoon v. Collector* (6). She relies upon order XLIII, rule 1, clause (c) C. P. as also upon clause 15 of the Letters Patent. Order XLIII,

(1) (1893) I. L. R. 15 All 359.

(2) (1901) 5 C. W. N. 781 (795).

(3) (1906) I. L. R. 33 Calc. 1323.

(4) (1887) L. R. 14 I. A. 160; I. L. R. 11 Mad. 26.

(5) (1877) 3 Q. B. D. 1.

(6) (1912) L. R. 39 I. A. 197; 16 C. L. J. 245; I. L. R. 40 Calc. 21.

rule 1, clause (c) provides that "an appeal shall lie from an order under order IX, rule 9 rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit." The question, consequently, arises, whether order XLIII rule 1, clause (c) is applicable to an order under order IX, rule 9, made by a Judge on the Original Side of this Court.

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On behalf of the appellant, reliance has been placed upon section 117 of the Code, which lays down that "Save as provided in this part or in part X or in rules, the provisions of this Code shall apply to High Courts established under the Indian High Courts Act, 1861." The only provision in Part IX, which may have any possible bearing, is that contained in section 120, which obviously does not touch the present question. The provision in Part X, which deals with this matter, is contained in section 129; this also does not militate against the contention of the appellant. The term "Rule," which finds a place in section 117, is defined in clause 18 of section 2 of the Code to mean "a rule contained in the first schedule or made under section 122 or section 125." Our attention has not been drawn to any such rule which makes order XLIII, rule 1, clause (c) inapplicable. On the other hand, order XLIX, rule 3, which excludes the operation of other rules, lends support to the contention of the appellant that order XLIII, rule 1, clause (c) is applicable to the present appeal.

But it has been argued on behalf of the respondents, on the authority of the decision of the Judicial Committee in *Hurriah Chunder Chowdhry v. Kali Sundery Debi* (1), that the Civil Procedure Code, in so far as it provides for appeals, does not apply to an appeal preferred from a decision of one Judge of a High Court to the Full Court. The true effect of the decision of the Judicial Committee was considered by this Court in *Toolsee Money Dassee v. Sudevi dassee* (2); but it is not necessary for my present purpose to determine its bearing in all its implications, because, in my opinion, the law has been substantially altered since that decision was pronounced. Section 104 of the Code of 1908 is materially different from section 588 of the Code of 1882. It provides that "an appeal shall lie from the orders mentioned in the first clause of that section and, *save as otherwise expressly provided in the body of the Code or by any law for the time being in force*, from no other orders." The effect of section 104 is thus, not to take away a right of appeal given by clause 15 of the Letters Patent, but to create

(1) (1882) I. L. R. 9 Calc. 482; L. R. 10 I. A. 4.

(2) (1899) I. L. R. 26 Calc. 361.

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a right of appeal in cases even where clause 15 of the Letters Patent is not applicable. I may here observe parenthetically that in the case of *Toolsee Monee Dassee v. Sudevi Dassee* (1), Prinsep J. felt pressed by the argument that if an appeal was deemed to have been allowed by the Code of Civil Procedure, there was no provision for the constitution of a Court to which such an appeal might be preferred. Section 106 of the Code, however, lays down that "where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made." Consequently, where a right of appeal has been so given, it would be the duty of this Court to constitute a Court of appeal under section 13 of the Indian High Courts Act. I hold accordingly that this appeal is competent under clause (c) rule (1), order XLIII of the Civil Procedure Code.

I am further of opinion that the appeal is competent also under clause 15 of the Letters Patent. That clause allows an appeal from a "judgment"; and, the controversy has consequently centred round this expression. Reference has been made to the now classical definition [*Brij Coomarsee v. Ramrick* (2)] first formulated by Couch, C. J., in the case of *The Justices of the Peace for Calcutta v. the Oriental Gas Co.* (3): "Judgment in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability; it may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined." Substantially the same view was adopted by Sargent, C. J. in *Sonabai v. Ahmedbhoy Habibhai* (4) and was later on applied by Couch, C. J. himself in *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (5), where he held that an appeal lies from an order refusing to set aside an order granting leave to a plaintiff to sue under clause 12 of the Letters Patent. Reference may also be made to the decision of this Court in *Kally Soondery Dabia v. Hurrish Chunder Chowdhry* (6), subsequently affirmed by the Judicial Committee [*Hurrish v. Kali* (7)] where an appeal was entertained against an order refusing to transmit for execution an order of His Majesty in Council. It must be remembered in connection with these decisions that they do

(1) (1899) I. L. R. 26 Calc. 361.

(2) (1901) 5 C. W. N. 781.

(3) (1872) 8 B. L. R. 433.

(4) (1872) 9 Bom. H. C. R. 398.

(5) (1874) 13 B. L. R. 91.

(6) (1881) I. L. R. 6 Calc. 594.

(7) (1882) I. L. R. 9 Calc. 482; I. R. 10 I. A. 4.

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not profess to give an exhaustive definition of the term "judgment," and other definitions of a very comprehensive scope, have, from time to time, been attempted for instance by Scott, C. J. in *Ahmed Bin Sheikh Essa Bin Khaliffa v. Ayeshabai* (1) by Bittleston J. in *De Sousa v. Coles* (2), and by White, C. J. in *Tuljaram Row v. Alagappa Chettiar* (3). In the opinion of Bittleston, J. the term 'judgment' includes "any decision or determination affecting the rights or the interest of any suitor or applicant," and that it is "impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from." In the opinion of White, C. J. this is too wide, and that the test is "not what is the form of the adjudication, but what is its effect in the suit or proceeding in which it is made; if its effect, whatever its form may be, and whatever be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court, before which the suit or proceeding is pending, is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment." But, whether we adopt the wider or the narrower view of the scope of the term "judgment"—although I may add that I am not disposed, as Maclean, C. J. was not disposed [*Brij v. Ramrick* (4)] to favour an attempt to place a narrow construction on the term "judgment,"—it is plain that the order in this case is a "judgment" within the definition formulated by Couch, C. J. in *The Justices of the Peace for Calcutta v. The Oriental Gas Company* (5). The order under appeal does affect the merits of the question in controversy between the parties by the determination of a right or liability. No doubt, it has been argued that the right or liability of the parties was determined by the dismissal of the suit and the position was not affected by the subsequent dismissal of the application to revive the suit. But this clearly overlooks the fundamental point that the primary order of dismissal of the suit was liable to be revoked, as it was subject to a possible order of restoration under rule 9. The effect of the subsequent order is accordingly to give a character of finality to the primary order of dismissal, by a determination that the applicant had failed to establish grounds in support of his alleged right to an order under rule 9 of order IX. Such determination is, in my opinion, a "judgment" within the meaning of clause 15 of the Letters Patent.

(1) (1909) 11 Bom. L. R. 248.

(2) (1868) 3 Mad. H. C. R. 384.

(3) (1910) 1 L. R. 35 Mad. 1.

(4) (1901) 5 C. W. N. 781 (795).

(5) (1872) 8 B. L. R. 433.

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I am not unmindful that the contrary view may receive an apparent support from some dicta in reported decisions, for instance, *Rughoo Bibee v. Noor Jehan* (1); and *Gobinda Lal v. Shiba Das* (2). As regards the former case, which ruled that an order dismissing an application for review is not a "judgment," it is sufficient for our present purpose to observe that judicial opinion on this matter has not been uniform: *Ramhari v. Madan Mohan* (3); *Aubhoy v. Shamont* (4); *Mulji v. Bangabasi* (5). As regards the latter case, stress is laid upon the following passage in the 'judgment' of Ghose, C. J. "an order which terminates a proceeding is a judgment within the meaning of clause 15, but it must be a proceeding in the course of a suit or in relation thereto, and in which some question or other as to the right or liability of any party is raised, and not a proceeding in respect of a matter which had already come to termination by operation of law or otherwise." I feel bound to record my respectful dissent from this exposition of the law, for the qualification formulated plainly carries us beyond the definition of the term "judgment" as given by Couch, C. J., and if the question arises in another case precisely on all fours with the decision mentioned, and if it comes before me I shall not hesitate to refer the matter for consideration to a Full Bench. It is not necessary however to adopt that course on the present occasion, as admittedly there is no decision which precisely covers the case before us; and the class of cases which rule that an order refusing [*Tara v. Radha* (6); *Manley v. Patterson* (7); *Lutfali v. Asgur Resa* (8); *Kishen Pershad v. Tyluckdhari* (9)], or granting [*Amirrunnessa v. Behary Lal* (10), *Mowla v. Kishen* (11)], an application for leave to appeal to His Majesty in Council, or for stay of execution [*Mohabir v. Adhikari* (12), *Chitto v. Muszur* (13)], is not a 'judgment', plainly stands on a different footing.

As regards the merits, I am clearly of opinion that the application under rule 9 of order IX should have been granted. We have not had the advantage of hearing from Mr. C. R. Das his version of what took place in Court when the suit was dismissed

(1) (1869) 12 W. R. 459; 4 B. L. R. A. C. J. 10.

(2) (1906) I. L. R. 33 Calc. 1323.

(3) (1895) I. L. R. 23 Calc. 339.

(4) (1889) I. L. R. 16 Calc. 788.

(5) (1905) 9 C. W. N. 502.

(6) (1875) 24 W. R. 148. (7) (1881) I. L. R. 7 Calc. 339; 9 C. L. R. 166.

(8) (1890) I. L. R. 17 Calc. 455.

(9) (1890) I. L. R. 18 Cal. 182.

(10) (1876) 25 W. R. 529. (11) (1875) I. L. R. 1 Calc. 102; 24 W. R. 150.

(12) (1894) I. L. R. 21 Calc. 473.

(13) (1864) 2 Hyde 212.

for default. But, on the materials before me, I see no escape from the conclusion that there was a grave error of judgment on his part and that he should have proceeded with the suit. The question then reduces to this; should his client be penalized for his error of judgment, if so, to what extent. The client will be penalized by the order which the Court of appeal is about to make in so far as the payment of costs is concerned; but I am not prepared to hold that the client should be penalized to the extent of dismissal of her claim without investigation. Judicial decisions of high authority favour the view, that even where suits have been dismissed for the mistake or laches of the legal advisers of parties, the Court will not hesitate, if proper grounds are made out, to restore the suit upon payment of costs; [*Southampton v. Rawlins* (1); *Michell v. Wilson* (2); *Birch v. Williams* (3); *Hale v. Lewes* (4); *Muruga Chetty v. Rajasami* (5)], but reference need be made specially to one case in this country, *The Oriental Finance Corporation v. The Mercantile Credit and Finance Corporation* (6) and to another in England *Burgoine v. Taylor* (7). In my opinion, this appeal should be allowed and the suit restored on the conditions mentioned in the judgment of the Chief Justice.

Mr. N. C. Bose—Attorney for the Appellant.

Mr. K. K. De—Attorney for the Respondent.

A. T. M.

Appeal allowed: Suit restored.

(1) (1865) 34 L. J. Ch. 287.

(2) (1877) 25 W. R. 380 (Eng.).

(3) (1876) 24 W. R. 700 (Eng.).

(4) (1838) 2 Keen 318.

(5) (1912) 22 M. L. J. 284.

(6) (1866) 2 Bom. II, C. R. 267.

(7) (1878) 9 Ch. D. 1.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight Judge, and Sir Asutosh Mookerjee, Knight, Judge.

CASSIM AHMED MOLLA

v.

EUSUF HAJI AJAM PEPARDI AND ANOTHER.*

Ejectment—Notice to quit by one of two joint Receivers, if valid—Joint Receivers, duty of—Direction in order of appointment—Join tenants, demise by—Contract Act (IX of 1872), Sec. 200—Ratification.

A notice to quit given by one of two joint Receivers, on behalf of both, is not a valid notice and cannot terminate a tenancy,

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* Appeal from Original Decree No. 2 of 1916, against the decree of Mr. Justice Greaves, sitting on the Original Side, dated the 22nd November, 1915.

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The doctrine that where there is a demise by joint tenants, one may give notice on behalf of all, does not apply to the case of joint Receivers.

If the notice to quit is given by an unauthorised person, a subsequent ratification will not make it effectual, since the notice must be one which is in fact binding on the landlord when it is served.

When two persons are appointed joint Receivers, unless there is a direction or an indication to the contrary in the order of appointment, the intention of the Court must be deemed to be that they, as officers of the Court, should meet and discuss together the questions, which come before them for determination in the course of the management of the estate, and that in all matters which require the exercise of judgment and are not purely ministerial, the action taken should be the result of their united deliberation. The very object of appointment of joint Receivers would be defeated, if one were held competent to delegate his functions to the other.

Rights of property cannot be changed retrospectively by ratification of an act inoperative at the time ; to make an act rightful which otherwise would be wrongful, must be at a time when the principal could still have lawfully done it himself.

Appeal by the Defendant.

Suit for ejectment.

The material facts are stated in the judgment of Mr. Justice Greaves, which is as follows :

Greaves, J.—This is an action commenced by the two receivers of the estate of one Musaji Ahmed Saleji, and by their plaint the plaintiffs ask for an order against the defendant for delivery of possession of certain premises, No. 135 Lower Chitpur Road, and they also ask for damages at the rate of Rs. 570 a month from 1st May 1915. These premises were originally leased by the then Receiver of the estate of Musaji Ahmed Saleji to the defendant for a period of three years commencing from 1st February 1912 at a rental of Rs. 410 a month. The then receiver of the estate subsequently retired from the receivership and the plaintiffs were appointed by order dated 1st August 1913 to act as Receivers in his place. Apparently, at or about the termination of the lease which terminated on 31st January 1915, some correspondence or negotiations took place between the plaintiffs and the defendant with regard to the defendant paying an enhanced rent for the premises. The defendant apparently was unwilling to have his rent increased in any way and after termination of the lease he for some time stayed on in possession of the premises as a monthly tenant according to the custom of Calcutta. On the 26th March 1915, a notice was served by Messrs. Manuel & Agarwalla, who were attorneys for the plaintiffs, upon the defendant, giving him notice to determine his tenancy on the 1st May 1915, and the Receivers

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having given that notice entered into a lease of the premises in favour of one Siddick who is admittedly an undischarged bankrupt, the lease to be for a period of 3 years from 1st August 1915 at a rental of Rs. 560 a month. Prior to the notice to quit being served, correspondence passed between the plaintiffs' attorney and the defendant or somebody acting on behalf of the defendant. In one of the letters which are contained in the bundle of correspondence before me, the defendant expressed his willingness to pay for the premises a rental of Rs. 560 a month less a sum of Rs. 17-8 per month. The plaintiffs were apparently unwilling to fall in with this offer and this suit has resulted. The issues that I have to determine are, (1) Whether the notice of ejectment was given by both Receivers, and if not, whether such notice is valid. (2) What damages, if any, are the plaintiffs entitled to.

Now it is argued with regard to the first issue that inasmuch as one of the receivers Eusuf Hajee Ajam Pepardi was away at Surat at the time the notice was given, and the actual instructions for the notice were given not by him but by his co-receiver and co-plaintiff Haji Md. Jackaria, the notice is bad. I have been referred to several authorities by both sides, but, in my opinion, the answer that was given in cross-examination by Yusuf Haji Ajam Pepardi, where he says that although there was no definite arrangement with his co-receiver yet if one was away the other attended to the business and that this was their custom, although there was no arrangement to that effect, makes it clear that the notice was in fact good. It is true that they are not joint tenants and the authority to which I was referred is, in my opinion, not applicable, but having regard to the answer given by Yusuf Haji Ajam Pepardi, in my opinion as before stated the notice of ejectment was a valid notice and must be taken to have been given on behalf of both receivers. With regard to the 2nd issue I am asked by the plaintiffs to award the sum of Rs. 570 a month by way of damages from 1st May 1915 when the lease in fact expired, and this figure is arrived at as being the figure which Siddick agreed to pay for the premises. Siddick as before stated is an undischarged insolvent and therefore I am not prepared to take that figure as being the real measure of damages in this case, but I think the defendant is tied by his own offer to pay a rental of Rs. 560 less the sum of Rs. 17-8, and so under the circumstances I award as from 1st May 1915 until the premises are vacated by way of damages the sum of Rs. 542-8 a month and I order the defendant to vacate the premises by 1st January 1916.

I should like to add before I conclude that I am not at all satis-

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fied with the conduct of the receivers in this case who are officers of the Court. It seems to me entirely wrong for them, who it is admitted being Bombay men knew that Siddick was an undischarged bankrupt, to have entered into a lease with him rather than to have arranged with their old tenant which they clearly could have done to the advantage of the estate and to the prevention of this unfortunate litigation. In view of the fact that both knew that Siddick was an undischarged bankrupt, they will be liable to the estate for every penny of rent that Siddick fails to pay by reason of his financial position. I think it would be well, although, in view of the lease having been already entered into, I feel some difficulty in making an order to that effect, I say it would be well, before they give over possession of the premises to Siddick, that the receivers should at least endeavour to arrange with Siddick that the monthly rent might be made payable in advance. So far as costs are concerned, I sympathise with the defendant, as I think he has been badly treated by the receivers, and yet I think the costs must follow the event and the defendant must pay the costs of the suit on Scale No. 2.

Against this, an appeal was preferred.

Messrs. Langford James and S. Ghose for the Appellant.

Messrs. B. C. Mitter and C. C. Ghose for the Respondents.

The following judgments were delivered :

February, 11.

Sanderson, C. J.—This is an appeal of the defendant from the judgment of Mr. Justice Greaves in which he gave judgment for the plaintiffs, and the first question which arises is stated in this way:—whether the notice of ejectment was given by both receivers, and if not, whether such notice is valid.

The plaintiffs were receivers appointed by this Court for the purpose of managing a particular estate, and it is to be noted that in the appointment it is stated that they are appointed 'joint receivers.'

The first question which requires attention is whether the notice which was in fact given was given by both the receivers.

The notice itself was dated the 26th of March 1915, and was sent by the attorneys: on the face of it, it was a notice on behalf of both the receivers, but it appears from the evidence that at the time that notice was given one of the receivers, Eusuf Haji Ajam Pepardi, was not in Calcutta, and had not been in Calcutta, since the 1st of March, because his own evidence is to the effect that he left Calcutta about the 1st of March and did not return till some con-

siderable time afterwards, at all events after the 26th of March. It is material to observe what was the state of affairs when that receiver Mr. Eusuf, left Calcutta : At that time there was an applicant for the premises, named Siddick whereas the defendant Cassim Ahmed Molla was the existing tenant who had been in the premises for a considerable time. Now, as I understand the evidence, the position at the time Mr. Eusuf left Calcutta was this, that it was arranged that the higher officer should be accepted. Siddick had made a certain offer, and it was not certain whether the defendant, the existing tenant, would offer as much or more. The matter was undecided at the time Mr. Eusuf left Calcutta.

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Now what happened afterwards? This is shown by the letters themselves which are set out in the paper book : Apparently, almost immediately after Mr. Eusuf had left Calcutta, there was correspondence passing, and the defendant wrote on the 4th of March asking the receiver to allow him a little more time as his master was away in his country. The answer which was sent on the same day was to this effect : " In reply to your letter dated today we regret to state you that we can't postpone the meeting for you now as it was already settled in the last meeting. So you will send us your last written offer on the 5th instant before 3 p. m., if you desire to hire the same for the further period ; otherwise we will comply with the offer of another, which please note." I have no doubt whatever that "*another*" was Siddick—On the 5th of March, the defendant made his offer which was in these terms : " Hereby I beg to inform you that I accepting the offer on terms agreed by Siddick Hossein Esq., in respect of the above premises but with less Rs. 17-8 on account of your old tenant as anticipated by receivers in meeting. I shall thank you to confirm the same and oblige." I understand that to mean that he knew what the offer which Siddick had made was, and that he was then in that letter making a similar offer except that he desired a reduction of Rs. 17-8 a month, and he asked for that reduction by reason of the fact that he had been a tenant of these premises for a considerable time. That apparently was not accepted by the receiver who was in Calcutta, but on the contrary he wrote the next day and said, " We hereby give you notice to vacate the above premises (i.e. 135, Lower Chitpore Road) which is at present in your tenancy on or before the 31st March 1915 as it is already let to the other person. If you will fail to vacate and give us the possession of the same on 31st March 1915 we will hold you responsible for difference in rent and any other loss we shall have to undergo

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which please note," so that the receiver who was in Calcutta did not lose much time in making up his mind upon the receipt of the letter which the defendant had written on the 5th of March. Now, I am of opinion that upon that evidence it is clear that the letter which was sent on the 26th of March by the solicitors was not sent on behalf of both receivers; there is no evidence to show that between the 6th of March and the 26th of March any communication took place between the one receiver and the other: and, as was pointed out by Mr. Justice Mookerjee yesterday, if, as a matter of fact, Mr. Eusuf had been consulted before the notice of ejectment was sent by his joint receiver who was in Calcutta, nothing would have been easier than for him to have said so in his evidence and all the evidence which is given at page 10 would have been absolutely unnecessary. Therefore, on the first point I am of opinion that the letter or notice was not sent on behalf of both receivers, and in that respect the conclusion at which I have arrived, I think, is in agreement with that of the learned Judge in the Court below. But the learned Judge goes on to say on the second branch of the first question viz. "and if not, whether notice is valid," that it was valid, because he says "In my opinion the answer that was given in cross-examination by Eusuf Haji Ajam Pepardi where he says that although there was no definite arrangement with his co-receiver yet if one was away the other attended to the business and that this was their custom although there was no arrangement to that effect makes it clear that the notice was in fact good." Upon that point I regret to say that I am unable to agree with the learned Judge. Certain cases were cited to us yesterday which related to cases where the lessors were joint tenants. In my judgment, those cases have no application to this case at all, and I will shortly state the reason: In this case the plaintiffs were appointed by the Court joint receivers and I pause to consider what the object of the Court was in appointing two gentlemen joint receivers: As I understand, it was that the estate might have the benefit of the opinion of both these gentlemen,—the benefit of their experience and their judgment,—and it was the duty of each of them to apply his mind to the different matters which might arise for decision in the course of the management of the estate. It was not open to the receivers to carry on the receivership in the way, as is suggested, it was done in this case;—according to the answer of the witness, who says "I was going to submit—when Haji was not here I would attend business and when I was not here he would attend. There was no definite arrangement. That has been

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the practice always—that one acts when the other was away.” The ground on which I base my judgment is that he had no business whatever to delegate the duty which was imposed upon him by the Court, in the way suggested by him, it was his duty to do it. Therefore, the notice was not given as I have already held on behalf of both receivers and it was not valid for the reasons I have mentioned.

I just refer to two other matters : It was argued that even though the notice was not a valid notice at the time it was given, as it was not given on behalf of both receivers, still it was ratified by the receiver who was out of Calcutta. In my judgment, that argument is not a good one. Section 200 of the Indian Contract Act provides that “An act done by one person on behalf of another, without such other person’s authority, which if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.” That section I think applies to this case ; and, therefore, even if Eusuf, the receiver who was out of Calcutta at the time the notice of ejectment was given, has ratified it, still the notice was given without his authority, and it was one which would have the effect of terminating the interest of the defendant and consequently it is within the section and such ratification, even if made, did not make the notice valid. I wish further to say that it seems to me that if a receivership were to be carried on in the way in which apparently Mr. Eusuf and his joint receiver thought it right to do in this case, most undesirable results might occur, and I do not think we could have a very much better instance than the one before us. The learned Judge has expressed the opinion that he thinks the present tenant of the premises, the defendant, has not been reasonably treated, especially having regard to the fact that the tenant whom one of the receivers proposed to accept in his place was an undischarged bankrupt. And, in my opinion, when the existing tenant said that he was quite prepared to pay the same rent that the applicant for the tenancy was willing to pay, less Rs. 17-8, a month, that was a matter which ought to have been submitted to the judgment not only of one receiver but of both receivers. I think it is quite possible that if it had been submitted to the receiver who was out of Calcutta at the time, this difficulty would never have arisen.

For these reasons I think this appeal should be allowed, and

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the decree which was made in the Court below reversed, with costs of this appeal and in the Court below.

Woodroffe, J.—In my opinion the notice to quit served on the defendant was not a valid notice and I agree that the appeal should be allowed as stated in the judgment of the learned Chief Justice.

Mookerjee, J.—The facts material for the determination of the questions raised before us lie in a narrow compass, and may be briefly recapitulated. On the 1st August 1913, the respondents, Eusuf Haji Ajam Pepardi and Haji Mahomed Jackaria, were appointed joint receivers in respect of the estate of Musaji Ahmed Saleji. On the 26th March 1915, their solicitor gave a notice to the defendant, who was the tenant of a house comprised in the estate, that he must vacate the premises on the 30th April 1915. As the defendant did not act upon this notice to quit, the two receivers instituted the present suit on the 1st June 1915 with a view to eject him. He resisted the claim on the ground, amongst others, that his tenancy had not been validly terminated by a legal notice to quit. Mr. Justice Greaves over-ruled this contention and made a decree for ejectment in favour of the plaintiffs. On the present appeal, that decree has been assailed on the ground that there was no legal notice to quit, sufficient to terminate the tenancy. This raises two questions, namely, *first*, was the notice in fact given on behalf of both the receivers, and, *secondly*, if it was not so given, was it sufficient to terminate the tenancy.

As regards the first question, I feel no doubt upon the evidence that the notice, though it purports to be on behalf of both the receivers, was in reality given by only one of them. One of the two receivers, Pepardi, had left Calcutta on the 1st March 1915. There is no evidence to show that before he left he and his co-receiver had decided that a notice to quit should be served on the defendant. The negotiation which followed, show plainly that the matter was still open for consideration; and there is no room for doubt that the notice was given at the instance of Jackaria alone, who was in Calcutta, while his co-receiver was away in Surat, in the Presidency of Bombay.

As regards the second question, namely, whether a notice given by one of two joint receivers, on behalf of both, is a valid notice and is sufficient to terminate the tenancy, the answer depends upon the true legal position of joint receivers. When two persons are appointed joint receivers unless there is a direction or an indication to the contrary in the order of appointment, the intention of the

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Court must be deemed to be that they, as officers of the Court, should meet and discuss together the questions, which come before them for determination in the course of the management of the estate, and that in all matters which require the exercise of judgment and are not purely ministerial, the action taken should be the result of their united deliberation. The very object of appointment of joint receivers would be defeated, if one were held competent to delegate his functions to the other, as appears to have been done in the case before us. Pepardi frankly admitted in the course of his depositions that when Jackaria was not in Calcutta, he himself would attend to business, and, when he was away, Jakariah would attend, and added that "one acts when the other is away"; obviously, this was radically wrong. On the view I take of the true legal position of joint receivers, it is plain that a tenancy held under them, if terminable, must be determined by a notice to quit given them jointly.

On behalf of the respondents, reliance, however, has been placed on a familiar class of decisions, which show that where there is a demise by joint tenants, one may give notice on behalf of all: *Doe d Aslin v. Summersett* (1); *Doe d Kindersley v. Hughes* (2); *Alford v. Vickers* (3). This doctrine is confined in England to a common law notice to suit, and does not, in my opinion, apply to the case of joint receivers. As explained by Lord Ellenborough C. J. in *Right d. Fisher v. Cuthell* (4), the principle of these decisions is that every act done by one joint tenant for the benefit of himself and his companion shall bind the other, but not those which prejudice the other. To the same effect are the observations of Lord Tenterden in *Doe d. Aslin v. Summersett* (1), and of Baron Parke in *Doe v. Hughes* (2), namely, that a notice to quit given by one of several joint tenants, purporting to be given on behalf of them all, is good for all, because the tenant holds the premises only so long as he and they shall all agree. This exposition makes it manifest that the principle applicable to joint tenants does not govern cases of joint receivers. Consequently, the notice to quit in the case before us was bad in its inception.

In this view, the respondents have argued, as a last resort, that as the two receivers have joined in the institution of this suit on the basis that the notice was validly given on behalf of both of them, Pepardi must be deemed to have ratified the action of Jackaria,

(1) (1830) 1 B & Ad. 135.

(2) (1840) 7 M. & W. 139.

(3) (1842) Car. & Mar. 280.

(4) (1804) 5 East, 491; 7 R. R. 752.

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so that no question can arise as to the legality of the notice. In my opinion, there is no force in this contention, which is completely answered by section 200 of the Indian Contract Act and Illustration (b) appended thereto: "A holds a lease from B, terminable on three months' notice. C, an unauthorised person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A." This embodies the principle that rights of property cannot be changed retrospectively by ratification of an act inoperative at the time, or, as has sometimes been said, to make an act rightful which otherwise would be wrongful, must be at a time when the principal could still have lawfully done it himself. This is in accord with the balance of authorities in English law [*Right v. Cuthell* (1); *Doe v. Walters* (2); *Doe v. Goldwin* (3); *Seaward v. Drew* (4)], though expressions apparently capable of interpretation in support of the contrary view may be found in isolated cases: *Goodtitle v. Woodward* (5); *Doe v. Robinson* (6). It is, I think, incontestable that if the notice is given by an unauthorised person, a subsequent ratification will not make it effectual, since the notice must be one which is in fact binding on the landlord when it is served.

The position in this case, consequently, is that there was no valid notice to quit and the alleged ratification is of no avail to the plaintiffs, so that the tenancy of the defendant still subsists and the claim for ejectment is premature. The result is that this appeal must be allowed, the decree of Greaves J. reversed, and the suit dismissed with costs throughout.

Mr. B. P. Chunder : Attorney for the Appellant.

Messrs. Manuel Agarwalla & De : Attorneys for the Respondents.

A. T. M.

Appeal allowed : Suit dismissed.

(1) (1804) 5 East 491; 7 R. R. 752.

(2) (1830) 10 B. & C. 626.

(3) (1841) 2 Q. B. 143.

(4) (1898) 67 L. J. Q. B. 322.

(5) (1820) 3 B. & Ald. 689.

(6) (1837) 3 Bing. N. C. 677.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.

Re GOBORDHONE SEAL.

LUKHIPRIYA DASSI

v.

RAI KISSORI DASSI AND C. E. GREY.*

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January, 31.
February, 1. 2.

Benamider—True owner adjudicated insolvent—Benamider transferring to third person—Third person, rights of—Notice—Presidency Towns Insolvency Act (III of 1909), Sec. 57—Title by estoppel, if can be claimed against Official Assignee.

In order to make a transaction with the insolvent, which takes place after the presentation of an insolvency petition by or against the debtor, valid under section 57 of the Presidency Towns Insolvency Act, two things are necessary: (a) the transaction must take place before the date of the order of adjudication; and (b) the person with whom the transaction takes place must have no notice of the petition.

In the present case, as these conditions were not satisfied, the transaction was held to be invalid as against the Official Assignee.

In re Slabodinsky (1) and *In re Hart* (2) distinguished.

When there is a fictitious transaction with regard to a property, no title passes, notwithstanding the execution and registration of the documents; the transaction may fittingly be described as essentially a mark of the real ownership. A *benamider* is in no sense an owner of the property.

Per Mookerjee, J.—The title by estoppel which might have been claimable against the owner by reason of his conduct, cannot, after his adjudication, be claimed equally as against the Official Assignee by a person whose title has accrued after the adjudication order.

In a limited sense, the Official Assignee may be deemed the representative of the insolvent, but he cannot be regarded for all purposes as his successor in interest, for the property is vested in him with a view to paralyse the hand of the insolvent, who becomes by operation of law incompetent to deal with the estate to the detriment of his creditors.

Appeal by the Opposite Party.

Petition by the Respondent Rai Kissori Dassi that certain transfers should be set aside and should be held to be void as against the Official Assignee.

The material facts are stated in the judgment of the learned Chief Justice.

* Appeal from Original Order No. 61 of 1915, against the order of Mr. Justice Chaudhuri, sitting on the Original Side, dated the 16th March, 1915.

(1) (1903) 2 K. B. 517.

(2) (1912) 3 K. B. 6.

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Messrs. Langford James and N. C. Sarkar for the Appellant.*Messrs. B. K. Lahiri and Majumdar* for the Respondents.

A

C. A. V.

The judgments of the Court were as follows :

Sanderson, C. J.—This was a petition by Sreemutty Rai Kissori Dassi that certain transfers should be set aside and should be held to be void as against the Official Assignee.

The petitioner was the mother-in-law of the insolvent, and the transfers in question were, first of all, a conveyance by the insolvent to his wife which was dated 9th of November 1911, and, secondly, a conveyance from the insolvent's wife dated the 12th of October 1912 to the appellant who is the sister-in-law of the insolvent, she being the wife of the insolvent's brother.

Now, apparently the mother-in-law, the petitioner, filed a suit against the insolvent in the Small Cause Court for Rs. 1942 on the 7th of September 1911. The proceedings in that suit occupied a considerable time, as far as I understand, and the judgment was not in fact obtained until the 23rd of February 1912. On the 27th of February 1912, the insolvent against whom the judgment was obtained filed his petition, and he was adjudicated an insolvent on the same date. In the meantime the insolvent had, as I have already stated, on the 9th of November 1911, purported to convey his share in the property in question to his wife.

Now, the learned Judge who heard this petition, after hearing the evidence came to the conclusion that that conveyance was a fictitious one, to use his own words (at page 94, he says) "Taking all the evidence into consideration, I am of opinion that the sale by the insolvent to the wife was a fictitious sale." I understand him to mean by that, that the transaction was intended to be nothing more than a blind, that the insolvent never intended to pass the property to his wife, that he intended to retain the property and through his wife to retain control over it, and in that sense it was a fictitious transaction. On the face of it, it was a conveyance to the wife, but in fact it was no conveyance at all.

On the evidence, I think the learned Judge was quite justified in coming to that conclusion: I am not going through the evidence it is unnecessary for me to do that; it was read fully yesterday by the learned counsel for the appellant, and commented upon by him and also by the learned counsel for the respondent. Therefore, the position was this: that on the 27th of February when immediately before the adjudication, the property in his share of

the premises in question remained in him, because, as I have already said, this so-called sale was entirely a fictitious transaction. The result was that the property vested in the Official Assignee as soon as the adjudication took place.

What happened afterwards is that on the 12th of October, 1912, the insolvent's wife purported to sell the one-third share in the premises to the appellant, the sister-in-law of the insolvent. Now, the learned Judge has held that, that transaction also was a fictitious transaction. I am not prepared to go as far as that upon the evidence: I think there are certain elements which make me hesitate in finding that, that transaction was a fictitious one, as for instance, there is the fact that somewhere near Rs. 3,000 had to be found by the person who was put forward as the purchaser, namely, the appellant. There is no doubt whatever, as far as I can see, that there was a mortgage upon the premises, that the mortgagee was in no way connected with the insolvent or his wife or the purchaser—he was a total stranger and that upon the sale by the insolvent's wife to the appellant that mortgage was paid off to the extent of Rs. 1,150. In addition to that, within two or three days after this transaction, a house was bought for Rs. 1,700 in the name of the insolvent's wife, and the vendor of that property was a man, whose name was Babu Kali Kumar Pyne; and, there again I cannot find any trace that Babu Kali Kumar Pyne was in any way connected with the insolvent, his wife or the purchaser. Therefore, it must be taken that the vendor of that property and the mortgagee, who were total strangers to these parties were paid the sum of Rs. 2,850, and it is difficult for me on those facts to come to the conclusion that this second transaction was a fictitious transaction. Therefore, if it were necessary for me to come to a definite conclusion, I should be inclined to say that this transaction has not been proved to be a fictitious transaction. However, for the purpose of my judgment I will assume that it was not a fictitious transaction and that it was a *bona fide* purchase by the appellant. But even assuming that conveyance to be a *bona fide* conveyance and assuming that the purchaser had no notice—I am only assuming that in her favour—I am bound to say that I think there are facts which would give rise to very serious consideration as to whether the appellant, the purchaser, who was the sister-in-law of the insolvent, did not know all about the circumstances under which the first transaction took place—I say even upon the above-mentioned assumptions I still think that the conveyance of 12th October 1912 cannot be upheld as against the Official Assignee and for this reason: Inasmuch as the first transaction, namely,

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that of the 9th of November 1911, has been rightly held to be a fictitious transaction and nothing more than a fictitious transaction, the property vested in the Official Assignee. Section 57 of the Presidency Towns Insolvency Act provides :—"Subject to the foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act should invalidate in the case of an insolvency (a) any payment by the insolvent to any of his creditors ; (b) any payment or delivery to the insolvent ; (c) any transfer by the insolvent for valuable consideration ; or (d) any contract or dealing by or with the insolvent for valuable consideration :

Provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor." Therefore, in order to make any of the above-mentioned transactions with the insolvent which takes place after the presentation of an insolvency petition by or against the debtor, valid, two things are necessary : (1) the transaction must take place before the date of the order of adjudication, and (2) the person with whom the transaction takes place must have no notice of the petition.

Now, I will assume that the lady in question had no notice, but it is quite clear that the transaction in this case, namely, of the 12th of October, 1912 took place after the order of adjudication : and, therefore, in my opinion, it cannot be held to be a valid conveyance as against the official assignee, because it must be taken in this case that the transaction of the 12th October, 1912 was in effect a transaction between the insolvent himself and the appellant. Now, the cases which Mr. James has quoted do not seem to me to be really relevant to this question ; provided that it is once recognized that the first transaction, namely, of the 9th of November 1911, was nothing more than a fictitious transaction, and the second transaction must be regarded as, between the insolvent himself and the appellant on the other.

The case upon which Mr. James has placed the greatest reliance is *In re Slobodinsky* (1) and the judgment of Mr. Justice Wright at page 524. The conveyance in that case was by Slobodinsky to a Company. Mr. Justice Wright in the first instance had to consider the effect of that conveyance, just as we have to consider the effect of the conveyance to the wife. The learned Judge in this case has held that the transaction was a fictitious transaction, and I agree

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with him. Now, what Mr. Justice Wright held in that case was that the conveyance to the Company was a fraudulent conveyance liable to be set aside on certain events happening; still, it was a conveyance by which it was intended by the debtor to pass the property, and a conveyance which would pass property to the Company until the conveyance was set aside. He says, "This having been a fraudulent conveyance or transfer of the debtor's property so far as he was concerned, how does the law stand? One case which the trustee might make might be that the Company was an entirely sham Company, that it was really the debtor himself, and that the conveyance to the Company ought not to stand inasmuch as it was in substance a conveyance to himself. I am not, however, prepared to go that length and to say that I think this was entirely a sham Company. It seems to me that Melinsky's business was a genuine one, and the *bona fide* transfer of his business to the Company and his presence on the board are elements that go some way to show that there was an independent Company. There are also some *bona fide* shareholders who hold some 66½ shares. I think there was some prospect of the success of the Company, and that it was *not a mere fiction*." If he had held that it was a mere fiction, I gather from his judgment that it would not be necessary for him to consider the other points which he did in that case. It has been held in the present case that the conveyance which purported to be made by the insolvents to his wife was a *mere fiction*, and therefore that distinguishes the present case from *Slobodinsky's case* (1) on which so much reliance has been placed.

Another case, *In re Hart, Ex parte Green* (2) that was cited raises a different question. The facts, broadly speaking, were these: A certain gentleman Mr. Hart, who was a director of a Company transferred, as far as we know perfectly *bona fide*, some shares of the Company to his daughter Miss. Hart, on the 14th of October, 1909. On the 13th of April 1910, his daughter sold these shares to Miss. Lomas, for good consideration, and Miss Lomas had no notice of the act of bankruptcy committed by Mr. Hart. But in the meantime Mr. Hart had on the 31st of March, 1910 committed an act of bankruptcy, and there was a receiving order on the 22nd of April, 1910. I draw attention to that date because that date was not only after the voluntary settlement by Hart to his daughter, but it was after the sale by the daughter to the appellant. There was a great distinction between that case and the present. In *Hart's case* (2) there

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was a voluntary settlement which passed the property or was intended to pass the property to his daughter, and the transaction which passed the property to the claimant Miss. Lomas was between Miss Lomas on the one hand and Miss Hart on the other. In the present case the transaction must be taken to have been between the claimant, Mr. James's client, on the one hand, and the insolvent on the other hand, because the conveyance of the 9th of November 1911 was nothing more, than a fictitious transaction, the property remaining in the insolvent until the adjudication.

For these reasons, I do not think this case is covered by those two decisions. I think it is clear that inasmuch as the conveyance of the 12th of October 1912 was not made until after the adjudication of insolvency which took place on the 27th of February 1912, that transfer ought to be set aside, as against the official assignee.

I have only one word to add and that is this : Mr. James says that it is very hard upon the purchaser. It may be ; but on the other hand, one has to remember that this estate is in insolvency, and there are creditors, and the rights of the creditors have to be considered just as much as the rights of the purchaser of this particular property : and, it seems to me that if we are to hold the contrary to the above conclusions we might as well have no insolvency laws at all, because all that would be necessary for the insolvent to do would be to imitate the conduct of the insolvent in this case, and he would then be able to defeat the claims of any creditor or creditors whom he wished to damage.

For these reasons, I think this appeal should be dismissed with cost.

Woodroffe, J.—The conveyance by the insolvent to his wife was clearly a *benami*. It may be a question whether the judgment under appeal can be supported in so far as it holds that the sale to Srimati Lakshi Priya was fictitious in the sense of *benami*. There are grounds for thinking that it was an arrangement made in pursuance of the original *benami* with a view to defeat and delay the creditor, the respondent. It is not necessary, however, to determine this question as the second conveyance which was really that of the insolvent having taken place after the adjudication cannot stand. It was sought to be effected after the title to the insolvent's property had vested in the official assignee. I am myself not disposed to think that the party who took under this conveyance was unaware either of the previous *benami* or of the insolvency, for it is to be observed, that the parties are all related to

one another and not strangers. There is, therefore, in my opinion, no hard case here as alleged. But in any case the conveyance is not protected having been made after the adjudication.

I agree therefore that the appeal should be dismissed with costs.

Mookerjee, J.—This is an appeal from a determination by Mr. Justice Chaudhuri that the title claimed by the appellant cannot prevail as against the Official Assignee. The disputed property is the share of the insolvent in his dwelling house. On the 9th November, 1911 he executed a conveyance in favour of his wife in respect of this share. On the 12th October, 1912, the wife executed a conveyance in respect of the same property to the present appellant. In the interval, there had been dealings with the property by the wife who on the 16th May 1912 executed a mortgage and on the 7th June following executed a deed of further charge thereon; these incumbrances were discharged on the 12th October, 1912. The adjudication in insolvency was made on the 27th February, 1912.

The case for the appellant is that she acquired a good title to the property, because she acquired it in good faith and for consideration from the wife of the original owner, who had effectively divested himself of all interests therein before his adjudication as an insolvent. Mr. Justice Chaudhuri has found upon the evidence that the conveyances of the 9th November, 1911 and the 12th October 1912 were both fictitious transactions. The correctness of the finding as to the true nature of the first of these deeds is, I think, unimpeachable. No consideration passed from the wife to the husband at the time when the conveyance was executed and registered. The deed was, besides, executed at a time when the transferor was in a state of considerable pecuniary embarrassment. Indeed, a suit had already been instituted against him on the 7th September, 1911 by his mother-in-law in the Calcutta Small Cause Court for recovery of a large sum of money; she subsequently obtained a decree against him on the 20th February 1912, and now impeaches the title of the appellant as a nominal transferee. As regards the conveyance of the 12th October 1912, however, I am not prepared, upon the record as it stands, to adopt the conclusion of the trial Judge. The evidence makes it plain that some consideration was paid by the purchaser to the vendor on the basis of this conveyance, and the money was apparently applied, partly in discharge of the debt due to the encumbrancer Narendra Krishna Mitra, and partly in payment to one Kali Kumar Pyne, who sold a house to the wife of the insolvent on the 14th October, 1912.

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There is nothing to indicate that the transactions with Narendra Krishna Mitra and Kali Kumar Pyne were not perfectly genuine. The question consequently arises, in what way is the position of the appellant affected by the fact that the lady who transferred the disputed property to her was the holder of a nominal conveyance from her husband.

Mr. Langford James has contended that the position of the wife under the nominal conveyance of the 9th November, 1911, is analogous to that of a person who accepts a voluntary settlement under the law of England. In my opinion, this view cannot possibly be sustained. It is well settled that when there is a fictitious transaction with regard to a property, no title passes, notwithstanding the execution and registration of the documents; the transaction may fittingly be described as essentially a mask of the real ownership. In this case, notwithstanding the execution of the conveyance by the insolvent in favour of his wife, he continued to be the owner of the property; he never intended to divest, and, consequently, never did, in fact or in law, divest himself of the ownership thereof. There is ample authority for the position that a *benamdar* is in no sense an owner of the property. For instance, the Judicial Committee observed in the case of *Thukrain Sookraj Koowar v. Government* (1) that the real owner may sue the ostensible owner to establish his title and to recover possession. This view can be maintained only on the hypothesis that the title has never passed from the real owner under the conveyance executed by him. Conversely, it was held by the Judicial Committee in the case of *Ramanugra Narain v. Mahasundur Kunwar* (2) that if the holder of the deed attempts to enforce his apparent title against the real owner, the latter may establish the real nature of the transaction and thus successfully defend himself against an unfounded claim. It has further been ruled by the Judicial Committee that the creditors of the real owner may seize the property in satisfaction of their claim against him on the assumption that he has never divested himself of his title thereto: *Musadee Mahomed Cazum Sherazee v. Meerza Ally Mahomed Shoostry* (3) and *Abdul Hye v. Mir Mohamed Musaffer Hosain* (4). Conversely, it has been ruled that if the creditors of the nominal owner attempt to seize the property as his, the real owner is competent to intervene and stop the execution: *Tara Soondaree Dehee v. Oojul Monnee Dossee* (5). The true position, thus, is that

(1) (1871) 14 M. I. A. 112.

(2) (1873) 12 B. L. R. 433.

(3) (1854) 6 M. I. A. 27.

(4) (1883) L. R. 11 I. A. 10; I. L. R. 10 Calc. 616.

(5) (1870) 14 W. R. 111.

notwithstanding the execution of the conveyance of the 9th November, 1911, the husband still continued to be in fact the owner of the property. What then was the legal effect of the adjudication order passed on the 27th February, 1912? The property, by operation of law, vested in the Official Assignee. Consequently, when we turn to the conveyance of the 12th October, 1912, executed by the wife in favour of the appellant, the inference becomes irresistible that she did not acquire any title, as she took her conveyance from a person who herself had no title whatsoever. It may be conceded, as repeatedly ruled by the Judicial Committee [*Ramroomar Koondoo v. John and Maria Mc. Queen* (1), *Mir Mahomed Mozuffer Hossein v. Kishori Mohun Roy* (2) and *Luchman Chunder Geer Gossain v. Kalli Churn Singh* (3)] that if the property had still continued with the husband, the appellant might have established a good title by estoppel against him on proof that she was a *bona fide* purchaser for value without notice of his secret title. It is not suggested that there was anything in the conduct of the Official Assignee himself which would make the equitable doctrine of estoppel applicable against him; consequently there is no room for application of the class of cases of the type of *Troughton v. Gitty* (4); *Re Rawbone's Trust* (5); *Tucker v. Herniman* (6); *Engleback v. Nixon* (7); *Wadling v. Oliphant* (8); *Ex parte Bolland* (9); *Ex parte Cooper* (10). Consequently, the only question we are called upon to consider is, whether the title by estoppel which might have been claimable against the owner by reason of his conduct, may, after his adjudication, be claimed equally as against the Official Assignee by a person whose title has accrued after the adjudication order. In my opinion the answer must be in the negative. If the contention of the appellant were to prevail, the fundamental policy of the bankruptcy laws would be defeated. The policy is that as soon as an adjudication order has been made, the entire estate of the insolvent should vest in the Official Assignee for the benefit of his creditors. In a limited sense, the Official Assignee may be deemed the representative of the insolvent; but he cannot, for all purposes, be regarded as his successor in interest; for the property is vested in him with a view to paralyse the hand of the

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(1) (1872) 11 B. L. R. 46; 18 W. R. 166; L. R. I. A. Sup. 40.

(2) (1895) L. R. 22 I. A. 129; I. L. R. 22 Calc. 909.

(3) (1873) 19 W. R. 292.

(4) (1766) Ambler 630.

(5) (1857) 3 K. and J. 476; 112 R. R. 243.

(6) (1853) 4 DeG. M. & G. 395; 102 R. R. 186.

(7) (1875) L. R. 10 C. P. 645.

(8) (1875) 1 Q. B. D. 145.

(9) (1878) 9 Ch. D. 312.

(10) (1878) 39 L. T. 260.

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insolvent who becomes by operation of law incompetent to deal with the estate to the detriment of his creditors. If the appellant were to succeed in her contention, the result would follow that although the insolvent himself could not possibly convey a good title to her after the adjudication order, yet it was open to him, through the medium of his nominal transferee to effectuate the same fraudulent purpose. It would be lamentable if the beneficent object of the bankruptcy laws were permitted to be circumvented by so transparent a device.

The contention of the appellant is, I may add, in no way assisted by the cases discussed in the course of argument, namely, *In re Vansittart* (1); *In re Brall* (2); *In re Carter & Kenderdine's Contract* (3); *In re Slobodinsky* (4); *In re Hart* (5); and *In re Branson* (6). These decisions are distinguishable on two obvious grounds. In the first place, the persons who claimed protection there as against the trustee in bankruptcy derived their title from a person who had acquired a real title from the insolvent under a voluntary settlement. In the case before us, the person from whom the appellant claims title was at no time, in law or in fact, the owner of the disputed property. In the second place, the title of the persons who were afforded protection, had accrued before the receiving order was made. In the case before us, the title of the appellant accrued after the adjudication order had been made, and was in essence a title derived from the insolvent himself.

Finally section 57 of the Presidency Towns Insolvency Act, to which reference has been made does not avail the appellant, in the absence of both the elements requisite to make that provision applicable. In the first place, the title of the appellant was not acquired before the order of adjudication was made. In the second place it is not shown that the title was acquired without notice. It is reasonably plain, in all the circumstances disclosed in the evidence, that the appellant was aware of the circumstances of the insolvent and cannot be deemed a purchaser without notice; and there can be no question that unless she is a purchaser in good faith, she cannot be afforded protection in insolvency proceedings: *Exp. Rabbidge* (7); *In re Badham* (8); *Shears v. Goddard* (9); *In re Jukes* (10); *In re Dunkley and Son* (11).

(1) (1893) 2 Q. B. 377.

(3) (1897) 1 Ch. 776.

(5) (1912) 3 K. B. 6.

(7) (1878) 8 Ch. D. 367.

(9) (1896) 1 Q. B. 406.

(2) (1893) 2 Q. B. 381.

(4) (1903) 2 K. B. 517.

(6) (1914) 3 K. B. 1086.

(8) (1893) 10 Morrell 252.

(10) (1902) 2 K. B. 58.

(11) (1905) 2 K. B. 683.

On these grounds I hold that the order made by Mr. Justice Chaudhuri must be affirmed and this appeal dismissed with costs.

Mr. J. N. Mitter.—Attorney for the appellant.

Messrs. R. M. Chatterjee and Co.—Attorneys for the Respondents.

A. T. M.

Appeal dismissed.

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Mookerjee, J.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookherjee, Knight, Judge.

PRABHULAI AND ANOTHER

v.

KUMAR KRISHNA DUTT.*

CIVIL.

1916.

January, 3.

Attorney and client—Attorney giving notice to withdraw from the case—Reasonable notice—Solicitor, when can withdraw from a case—Good grounds, what are.

Even if the conduct of the client is such as makes it impossible for the solicitor to continue to act, the client is entitled to reasonable notice of his application for withdrawal.

Hoby v. Buitt (1); *Whitehead v. Lord* (2); *Nicholls v. Wilson* (3); and *Harris v. Osbourne* (4) referred to.

Giving notice that the attorney would apply to be discharged from the case, which application came on for disposal the next day, was not giving reasonable notice of his withdrawal from the case to his client.

Per Mookerjee, J. : A solicitor retained to conduct an action may withdraw from it on good grounds. Such good grounds include misconduct of an offensive character or such misbehaviour on the part of his client as makes it impossible for a self-respecting solicitor to continue to act for him.

Steele v. Scott (5) and *Bryan v. Twigg* (6) referred to.

Appeal by the Clients.

* Appeal from Original Order No. 64 of 1915, against the order of Mr. Justice Chaudhuri, sitting on the Original Side, dated the 28th July, 1915.

(1) (1832) 3 B. & Ad. 350.

(3) (1843) 11 M. & W. 106.

(5) (1828) 2 Hogan 141.

(2) (1852) 7 Exch. 691.

(4) (1834) 2 Cr. & M. 62.

(6) (1834) 3 L. J. Ch. 114.

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1916.

Prabhulal

v.

Kumar Krishna.

Application by the attorney to withdraw from the suit.

On the 26th July, 1915, a summons was taken out by the respondent to the effect that the appellants should attend before Mr. Justice Chaudhuri sitting in chambers on the 28th July, 1915, at 11 A.M. on the hearing of an application to be made on the part of Babu Kumar Krishna Dutt attorney on record for the plaintiffs (the appellants) for an order that he be discharged from further acting as such attorney for the plaintiffs. The petition and affidavit in support of the application were served on the 27th. On the 28th July, Mr. Justice Chaudhuri ordered the discharge of the respondent, and directed the appellants to pay the respondent all costs due to him in the suit. Against this order, the plaintiffs appealed.

Mr. B. N. Bose for the Appellants.

Mr. N. Sirkar for the Respondent.

The judgments of the Court were as follows :

January, 3.

Sanderson, C. J.—I think this case raises a question of some importance with regard to the relationship of the client and attorney.

What happened in this case was this : On the 28th of July 1915, there was filed an affidavit which had been sworn by the attorney, Mr. Dutt, on the 26th of July, two days previously. Mr. Sarkar told us that the notice of the application and a copy of the affidavit at the same time were served upon the client on the 27th. The application was that the attorney should be discharged from his position of attorney and that he should not be called upon any longer to act on behalf of the client whose names were Prabhulal and Nannumal, and the ground of his application was that the client Nannumull had made certain charges against the attorney which were quite inconsistent with the attorney continuing to act as such attorney.

Now, in this case I wish it to be quite clearly understood that I do not say anything whatsoever about those charges. The learned counsel on the other side asked for an adjournment in order that he might substantiate the charges, but we are not giving him that opportunity for the reasons which will appear in my judgment directly. But I want, to guard myself by saying that I do not assume for a single moment in my judgment that there is any ground for those charges against Mr. Dutt. It may or may not be, but I want to make it clear that I do not base my judgment in any shape or form upon those charges or upon the *bona fides* of those charges.

I think the matter is of importance for this reason: I assume in favour of the attorney that those charges were in fact made; I assume further in his favour that there was no ground for them in any shape or form, still I am bound to come to the conclusion that what took place in this case was not right. I think the attorney was bound to give his client reasonable notice of the course he intended to take.

It is quite clear that the action which the attorney did take amounted to a discharge by himself, because it was he who initiated the proceedings: he gave notice to the client that he would apply to be discharged from his position as attorney in the case and he made an application to obtain the discharge; and, therefore he must be taken to have discharged himself. But Mr. Sarkar submitted as follow. He said in effect—Yes, it is quite true that technically the attorney discharged himself, but he could not go on acting as attorney on account of the absolutely unfounded charges the client had made against him. But even in these circumstances, I think, it was the duty of the attorney to give reasonable notice of his intention to withdraw. Notice was given to the client on the 27th of July, the application was made on the 28th of July, and the parties were before the learned Judge on the 28th, the attorney appeared himself but the client was unrepresented by any attorney and appeared in person. I think it is safe to assume that in that short time he had no opportunity for making any other arrangement or obtaining the assistance of another attorney, or perhaps raising funds which would be necessary before he could engage the services of another attorney. I find it stated in the 26th volume of Lord Halsbury's Laws of England, at page 739 as follows: "The solicitor is entitled to recover such remuneration where he is discharged by the client, or where he discharges himself for good cause." I am assuming that the attorney in this case discharged himself for good cause, still, the passage goes on to say "He must, however, give *reasonable* notice of his withdrawal from the case to his client." In my opinion, in this case no such *reasonable* notice was given. I do not think that giving notice that the attorney would apply to be discharged from the case, which application came on for disposal the next day, is giving *reasonable* notice of his withdrawal from the case to his client. It is for that reason I think this case is of importance not only to the profession but also to the client, and it must be clearly understood that if an attorney is going to withdraw from a case even if the ground for his withdrawal is good—it is incumbent upon him to give *reasonable* notice to his

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client of his intention, so that his client may have a *reasonable* opportunity of getting other advice and making other arrangements before the hearing of the application comes before the learned Judge.

On this ground, I think, the appeal must be allowed with costs.

As a matter of course the order for arrest goes.

Woodroffe, J.—I agree.

Mookerjee, J.—I agree that the order of Chaudhuri, J. under appeal must be set aside on the ground that the appellants had not reasonable notice of the application. It is well settled that a solicitor retained to conduct an action may withdraw from it on good grounds. Such good grounds include misconduct of an offensive character or such misbehaviour on the part of his client as makes it impossible for a self-respecting solicitor to continue to act for him : *Steele v. Scott* (1); *Bryan v. Twigg* (2). I express no opinion upon the question whether what is attributed to the client in this case did or did not amount to a conduct of this character. But if it is assumed in favour of the respondent that the conduct of his client was such as made it impossible for him to continue to act, the client was entitled to reasonable notice of his application for withdrawal : *Hoby v. Buitt* (3); *Whitehead v. Lord* (4); *Nicholls v. Wilson* (5); *Harris v. Osborn* (6). The notice which was given in this case was obviously unreasonably short ; the interval between the receipt of the notice and affidavit and the order by the Court was so short that it was impossible for the client to have himself represented by another attorney. The order must consequently be discharged with costs.

Messrs. S. D. Dutt and Ghosh.—Solicitors for the Appellants.

Babu Kumar Krishna Dutt.—Solicitor in person for the Respondent.

T. M.

Appeal decreed.

(1) (1828) 2 Hogan 141.

(2) (1834) 3 L. J. Ch. 114.

(3) (1832) 3 B. & Ad. 350.

(4) (1852) 7 Exch. 691.

(5) (1842) 11 M. & W. 106.

(6) (1834) 2 Cr. & M. 629.

CRIMINAL REFERENCE.

Before Mr. Justice Chitty and Mr. Justice Walmsley.

KING-EMPEROR

v.

AUSHI BIBI.*

CRIMINAL.

1916.

February, 10.

Evidence Act (I of 1872), Sec. 24—Confession—President of panchayet, if a person in authority—Misdirection—Jury.

Accused was called before a *salish* (assembly consisting of the president of panchayet and others) which was summoned to consider the case that was being made against her, and on being told that the *salish* would compromise the matter, made a confession of her guilt. The Judge in his charge to the jury said "A confession made under these circumstances is not inadmissible, because (a) the members of the *salish* were not persons in authority, (b) the accused was not then charged with any offence":

Held, that this amounted to a misdirection to the jury, inasmuch as the president of the panchayet is a person in authority within the purview of section 24 of the Indian Evidence Act, and it should have been left to the jury to say whether there was any inducement, threat or promise in the case. The confession ought to have been placed before the jury with an explanation as to how they should value it having regard to the circumstances in which it was made.

Nasir Jharudar v. The Emperor (1) and *The Emperor v. Jasha Bewa* (2) followed.

The confession having been excluded from consideration, and there being no sufficient evidence on the record to prove any offence against the accused she was acquitted.

Reference under section 307 of the Code of Criminal Procedure.

The accused Aushi Bibi was charged before the Additional Sessions Judge of Dacca and a jury with offences under sections 112 and 113 I. P. C. The jury unanimously found the accused not guilty of the charge framed against her, and the Judge disagreeing with the verdict of the jury and being of opinion that the accused was guilty under section 112 I. P. C., referred the proceedings to the High Court under section 307 of the Code of Criminal Procedure.

Babu Kali Prasanna Piplai (for *Babu Hem Chandra Majumdar*)
for the Accused.

Mr. Orr (Deputy Legal Remembrancer) for the Crown.

The judgment of the Court was as follows:—

This is a Reference under section 307 Cr. P. C. in the matter of Aushi Bibi who was charged before the Additional Sessions Judge

February, 10.

* Criminal Reference, No. 54 of 1915, by S. E. Stinton Esq., Additional Sessions Judge, Dacca, by an order dated 23rd December, 1915.

(1) 1905) 9 C. W. N. 474.

(2) (1907) 11 C. W. N. 904.

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of Dacca and a jury with offences under sections $\frac{402}{118}$ and $\frac{402}{118}$ I. P. C. The case against Aushi Bibi was that she suspected an intrigue between her husband and Adarjan. She accordingly gave a powder, which was subsequently found to contain, arsenic to Chandra Bhan—a girl of 13 years of age—the wife of Jorip. This girl was a relation of the accused. Aushi Bibi told Chandra Bhan to give the powder to Adarjan by mixing it with lime in a pan or by mixing it with rice. The powder which was wrapped up in a red paper was taken by Chandra Bhan; and, as her aunt Nekjan came to the *bari* shortly afterwards, she showed it to her aunt and told her what had happened. Nekjan told her not to give it to Adarjan but to throw it away. Nekjan tested some of it by putting it in water when it is said to have become dark. Chandra Bhan also said that Nekjan further tested it by placing it on the rind of a *jambura* or lemon. This incident Nekjan does not mention. This was Wednesday. On the Friday the matter got about in the village and a *salish* was summoned and Aushi Bibi and Chandra Bhan were called before the assembly. Manu Mandal, the president, questioned them both; and, though Aushi Bibi at first denied having got the poison, she eventually went and produced it. Manu Mandal is dead; but the witnesses who speak to what took place in the *salish* prove that she at first denied the occurrence but, on being told that the *salish* would compromise the matter, she went and brought the powder of her own accord. It should be stated that Aushi Bibi had asked Chandra Bhan to give her back the powder and that Chandra Bhan had given her back a portion retaining a portion herself. This other portion Chandra Bhan also produced before the *salish*. Both the portions were placed together and sent eventually to the chemical analyser who reported that traces of white arsenic were found in the powder. That is the case against the accused; and, on the evidence, the jury returned a unanimous verdict of not guilty. The learned Additional Sessions Judge disagreeing with that has referred the case for our decision.

In the first place, we should mention that the learned Judge has possibly misdirected the jury in the matter of the confession to the members of the *salish*. He says in his charge: "A confession made under these circumstances is not inadmissible, because (1) the members of the *salish* were not persons in authority, (2) the accused was not then charged with any offence."

As to the first reason, there are decisions of this Court holding that the president of a *pauchayet* in such circumstances is or may be a person in authority within the purview of section 24 of

the Indian Evidence Act. We may refer to the two cases of *Nazir Jharudar v. The Emperor* (1), and *The Emperor v. Jasha Bewa* (2). It would depend on the question of fact, whether the confession was caused by any inducement, threat or promise, having reference to the charge against the accused person. It should, therefore, have been left to the jury to say whether there was any such inducement, threat or promise in this case; but to tell them that the president of a panchayet was not a person in authority within the meaning of section 24 of the Evidence Act was clearly erroneous.

The second reason given by the learned Judge is also incorrect, because the *salish* was undoubtedly summoned to consider the case which was being made against Aushi Bibi of having given poison to Chandra Bhan to be administered to Adarjan. She was, therefore, before the *salish* on that charge.

In this case there appears to have been a direct inducement from the president and members of the *salish* that if she confessed they would compromise the matter. It is, therefore, extremely doubtful whether this confession should have been allowed to be placed before the jury at all. It certainly ought not to have been placed before them without an explanation as to how they should value it having regard to the circumstances in which it was made.

Excluding that confession from consideration, there remains only the evidence of Chandra Bhan corroborated, so far as it is corroborated by the evidence of Nekjan. We feel unable to say, in these circumstances, that the jury were wrong in rejecting this evidence against the accused Aushi Bibi. They had these facts before them and they were entitled to reject that evidence for any reason that they thought proper.

There is the further fact that the chemical analysis does not disclose how much arsenic was found in this powder. There is, therefore, no evidence on the record against the accused as to the amount of poison which was proposed to be administered to Adarjan.

It would be difficult, therefore, to say whether the case would come under section 302 or section 328 I. P. C. or whether there would be any offence proved against Aushi Bibi at all. We accordingly direct that the verdict of the jury be upheld and that Aushi Bibi be acquitted.

A. N. R. C.

Verdict of the jury upheld.

(1) (1905) 9 C. W. N., 474.

(2) (1907) 11 C. W. N. 904.

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CIVIL RULE.

Before Mr. Justice Holmwood and Mr. Justice Mullick.

ANILA BALA DASSI

v.

RAJENDRA NATH DALAL AND ANOTHER.*

CIVIL.

1915.

November, 25.

Probate Court, power of—Court, if can direct discovery of the assets of the deceased,—Discovery—Civil Procedure Code (Act V of 1908), Order XI—Interrogatories.

Order XI of the Code of Civil Procedure applies to proceedings in probate, and as such a probate Court can direct an executor to an estate to make a full discovery of the assets of the deceased by an affidavit sworn by himself. The affidavit can, however, only be obtained by delivery of interrogatories, and until the interrogatories are filed the Court is absolutely without any power whatever in the matter.

Civil Rule obtained under section 115 of the Code of Civil Procedure.

The material facts will appear sufficiently from the judgment.

Dr. Dwarka Nath Mitter and Babu Satis Chandra Ghatak for the Petitioner.

Babus Jogendra Nath Mukherjee, Sarat Chandra Mukherjee and Paresb Nath Mukherjee for the Opposite Party.

The judgment of the Court was as follows :

November, 25.

This was a Rule calling upon the opposite party to show cause why the order of the Court referred to in the petition should not be set aside and the opposite party directed to make a full discovery of the assets of the deceased by an affidavit sworn by them personally in the form required by law.

It appears that a petition was filed before the learned Judge averring that the inventory filed by the other side as executors to her husband's estate which alleged that only forty-seven thousand Rupees came into their hands in cash was erroneous and that as a matter of fact they obtained a lakh of Rupees or more and they asked the District Judge to direct the opposite party to make a full discovery of the assets of the deceased by an affidavit sworn by the opposite party personally. The learned Judge refused the application on the ground that there appeared to him to be nothing in the Probate Act which would enable him to make any such discovery. He apparently did not have it brought to his notice that section 55 of the Probate and Administration Act lays down that proceedings of the Court of the

* Civil Rule No. 932 of 1915, against an order of A. H. Cumming, Esq., District Judge of 24-Pergannas, dated the 6th August, 1915.

District Judge in relation to the granting of Probate and Letters of administration shall except as hereinafter otherwise provided be regulated so far as the circumstances of the case will admit by the Code of Civil Procedure. There is therefore no doubt that order XI of the present Code of Civil Procedure applies to proceedings in probate. Under that order there are only two methods of discovery, one by interrogatories and the other by an order directing discovery of documents in the possession or power of the other side. The affidavit which the petitioner desires to obtain can therefore only be obtained by the first method, namely, by interrogatories; and it is laid down clearly in order XI, rule 2 that on application for leave to deliver interrogatories the particular interrogatory proposed to be delivered shall be submitted to the Court; and in the case before us no interrogatories whatever were submitted to the Court; and it has been held in England and the same rule applies in this country that under this rule the Judge has not any power to settle interrogatories, but he can only decide what should be administered. Until the interrogatories are filed it is impossible for him to settle whether there is anything offensive, improper or irrelevant in those interrogatories; and the dicta that have been laid before us from English cases with regard to the more extensive powers of Court in matters of probate seem to us to imply that possibly in such matters the Judge would not be astute to insist upon the strictest relevancy, but he certainly would be obliged to exclude anything offensive or improper in the same way as in any other case. It may be that in matters of probate the strictest relevancy in the interrogatories may not be required, but this is a matter for the Judge to decide when the interrogatories are filed before him. Until the interrogatories are filed he is absolutely without any power whatever in the matter.

We are therefore unable to help the petitioner upon the present Rule. As there is no provision of limitation applying to such proceedings we can see no reason why he should not file a proper petition with proper interrogatories as laid down in order XI of the Code of Civil Procedure, and we have no doubt that if he does so, the Judge will give them the proper attention in the exercise of his judicial discretion and administer such as may be according to law.

With these remarks the Rule is discharged. The opposite party is entitled to his costs of this hearing which we assess at one gold mohur.

A. N. R. C.

Rule discharged.

CIVIL.
1915.
Anila
v.
Rajendra.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

KHOBHARI SAH

v.

JHAMAN SAH AND OTHERS.*

CIVIL.

1915.

February, 26.

Civil Procedure Code (Act V of 1908), Order XXIII, r. 3, scope of—Suit, adjustment of—Arbitration, reference to—Agreement, enforcement of.

An agreement by the parties to a suit to refer a dispute to arbitration does not come within the scope of order XXIII, rule 3 of the Code of Civil Procedure, inasmuch as such an agreement does not finally dispose of the suit as there is still a great deal of judicial work to be done, evidence has to be considered and weighed, and a judicial opinion arrived at.

Tincowry Dey v. Fakir Chand Dey (1) referred to.

Where, however, the parties presented a petition to Court, and agreed that the case should be finally disposed of in one way if a simple fact was found to exist, and in another way if it was found not to exist, the agreement came within the terms of order XXIII, rule 3 of the Code, as no further judicial action was necessary; and the agreement being capable of enforcement the losing party should not be entitled to repudiate it after the fact, on which it depended, had been ascertained.

Muhammad Zahur v. Cheda Lal (2) explained.

Rule obtained by the plaintiff, Khobhari Sah, upon an application for revision under section 25 of the Provincial Small Cause Courts Act.

The material facts and arguments will appear sufficiently from the judgment of Coxe J.

Babu Rajendra Prosad for the Petitioner.

Babu Probodh Chandra Mukherjee for the Opposite Party.

The following judgments were delivered :

February, 26.

Coxe, J.—In the suit out of which this Rule arises, the plaintiff's case was that he gave the defendant a certain amount of metal with which to prepare ornaments. He sued for the recovery of the metal, damages and the money advanced. When the case was heard, a petition was put in by both parties which runs as follows :—"It has been settled between the parties that this matter be enquired into by some pleader who may be sent to the defendant's house, the boundaries of which are given below : so that he may see whether the defendants do the work of casting and whether bellows or signs of furnace or bellows are found in the said house.

* Civil Rule No. 1112 of 1914, against the decision of Babu Charu Chandra Mukherjee, Subordinate Judge of Sarun, dated the 9th September, 1914.

(1) (1902) I. L. R. 30 Calc. 218.

(2) (1891) I. L. R. 14 All. 141.

In case the aforesaid things or their signs are found to exist, a decree shall be given in favour of the plaintiffs, and in case of the said things being found not to exist, the suit shall be dismissed. The parties shall have no objection. For this reason we are sending Babu Jagat Prosanno pleader."

For this reason, Babu Jagat Prosanno Mookerjee, pleader went to the house and found that the things did exist. But the learned Subordinate Judge did not decide the case in accordance with the agreement on the ground, apparently, that the defendant retracted his consentment; and proceeded to dispose of the suit on the merits.

The plaintiff has obtained this Rule on the opposite party to show cause why this order should not be set aside on the ground, *firstly*, that the Court below ought to have held that the petition of the 7th September, 1914, was an adjustment of the suit and, *secondly*, that the Court below was in error in allowing the defendant to withdraw from the agreement.

It appears to me that the Rule should be made absolute.

It has been held that an agreement to refer a dispute to arbitration does not come within the scope of section 375, now order XXIII, rule 3. This was held by a Full Bench (?) in *Tincowry Dey v. Fakir Chand Dey* (1), although the opposite view has been taken in *Pragdas Sagurmall v. Girdhardas Mathuradas* (2). But it seems to me that the agreement made in this suit comes far more closely within the terms of order XXIII, rule 3 than an agreement to refer to arbitration. When the parties agree to refer a dispute to arbitration, there is still a great deal of judicial work to be done, evidence has to be considered and weighed and a judicial opinion arrived at. It may well be held that such an agreement does not finally dispose of the suit. But here we find that the parties agreed that the case should be finally disposed of in one way if a simple fact was found to exist, and in another way if it was found not to exist, no further judicial action was necessary. It would, I think, be unnecessary and unjust to hold that such an agreement cannot be enforced; and if such an agreement is held to be capable of enforcement, it clearly would be unreasonable to hold that the losing party should be entitled to repudiate it after the fact, on which it depended had been ascertained.

The learned pleader for the opposite party has relied on the case of *Muhammad Zahur v. Cheda Lal* (3). But in that case the

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(1) (1902) I. L. R. 30 Calc. 218.

(2) (1901) I. L. R. 26 Bom. 76.

(3) (1891) I. L. R. 14 All. 141.

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agreement was of a very curious character. The parties did not agree that the suit should be disposed of in accordance with what was found as a matter of fact to exist, but merely that if a certain bond was produced, the plaintiff's testimony should be discredited to that extent; and if it was not produced, another witness should be discredited to that extent. The case could not therefore have been disposed of on that agreement.

An affidavit has been put in, in which it is stated that the defendant paid to the plaintiff, all expenses of taking the pleader Babu Jagat Prosanno Mookerjee to the spot, and that thereupon the plaintiff waived his objection to the suit being proceeded with. This argument made a great impression on us but its effect has been entirely destroyed by the fact that the defendants have been given a decree for this sum of money. If therefore it is supposed that the plaintiffs waived their objection to the suit being provided with on being paid the costs of the investigation, they cannot now be debarred from attacking the decision when they have been held liable for the repayment of that money.

The only objection that was taken to the pleader's inspection was that he examined the wrong hut. The pleader was called and gave evidence that the defendant admitted that it was the right hut. He was not cross-examined on that point. We need not therefore remand the case for the investigation of this trifling matter of fact. In our opinion, the Court should have acted on the agreement and should not have allowed the losing party to resile from it.

The Rule is accordingly made absolute, the suit will be decreed in accordance with the petition of the 7th September and the plaintiff will be entitled to his costs of both Courts. We assess the hearing fee at two gold mohurs.

Sharfuddin, J.—I agree.

A. N. R. C.

Rule made absolute.

APPELLATE CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

BHUSHAN CHANDRA GHOSE AND OTHERS

v.

SRIKANTA BANERJEE.*

CIVIL:

1916.

March, 16.

Ejectment—Bengal Tenancy Act (VIII of 1885) Sec. 167—Purchaser seeking to annul the sub-tenancy—Sale of superior tenancy for arrears of rent—Adverse possession against sub-tenant—Incumbrance—Notice.

When a person has, by adverse possession against a sub-tenant, acquired a statutory title to a portion of the lands comprised in the sub-tenancy, he has an interest in the sub-tenancy, so that when, on a sale of the superior tenancy for arrears of rent, the purchaser seeks to annul the sub-tenancy as an "incumbrance," such person stands in the position of an "incumbrancer" and is entitled to notice under section 167 of the Bengal Tenancy Act.

Gocool v. Debendra (1) and *Arsadulla v. Mansub* (2) distinguished.

Appeal by the Defendants.

Suit for ejectment.

B, who held a *makarari* tenure under the talookdar A, created a permanent under-tenure in respect of 60 bighas in favour of C. D acquired by adverse possession a good title to 2½ bighas of the under-tenure against C. A brought a suit for recovery of arrears of rent against B and obtained a decree. At the sale held in execution of that decree, the plaintiff purchased the *makarari* tenancy of B and took proceedings under section 167 of the Bengal Tenancy Act to annul the incumbrance on the property, that is the tenancy created by B in favour of C. He served a notice under section 167 of the Bengal Tenancy Act on C. The question was whether the notice so served affected D. This was answered in the affirmative by the Courts below. Hence this appeal.

Babus Bepin Behary Ghose and *Mohini Mohan Chatterjee* for the Appellant.

Babus Mahendra Nath Ray and *Kalidas Sarkar* for the Respondent.

The judgments of the Court were as follows:

Sanderson, C. J.—This is an appeal from the judgment of the Subordinate Judge of Burdwan, in which he gave judgment for

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* Appeal from Appellate Decree No. 2459 of 1914, against the decree of Babu Jadab Chandra Bhattacharyya, Subordinate Judge of Burdwan, dated the 16th May 1914, confirming that of Babu Narendra Nath Ghose, Munsiff of Burdwan, dated the 31st March, 1913.

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the plaintiff: and, the defendants Nos. 1 and 2 whom I may call the Ghose defendants have appealed.

Now, it appears that in 1886, the Mukerjee who held under one Ameer Ali entered into an agreement with an individual whom I shall call Pal, by which a subordinate tenure was created, and it appears that this tenure was of the character of a permanent under-tenure. It was in respect of sixty bighas, but apparently, prior to 1889 a man called Gobardhone had got into occupation of $2\frac{1}{2}$ bighas, part of the 60 bighas and he was paying rent to the first and second defendants, the Ghoses, and in 1889, Pal brought an action against Gobardhone and the first two defendants, the Ghoses, for the purpose of recovering possession of the $2\frac{1}{2}$ bighas. He failed in that action, and from that time Gobardhone or some other occupant has been in possession of the $2\frac{1}{2}$ bighas, and Gobardhone or the other occupant has been paying rent to the Ghoses down to the institution of the present suit.

Now, a suit for rent was brought by the landlord against the Mukherjee in 1902, and a decree was obtained in that suit. The plaintiff purchased the land in pursuance of that decree, and in order to obtain possession of the land free from incumbrances he gave notice or caused notice to be given to Pal or his representatives,—I am not sure whether he was still alive—for the purpose of putting an end to the incumbrance which was the agreement of tenancy created between the Mukerjees and Pal. But the Ghoses say in this case that they two were the holders of an incumbrance within the meaning of section 167 of the Bengal Tenancy Act, and therefore they were entitled to notice: and, that is the question in this case, namely, whether the Ghoses were in the position of holders of such an incumbrance as entitled them to notice under section 167. I am of opinion that they were.

It appears that the tenancy was of the nature, as I have already said, of a permanent tenure which was capable of assignment either in whole or in part, and therefore if Pal had assigned his interest in the tenure in respect of the $2\frac{1}{2}$ bighas to the Ghoses, in my judgment the Ghoses would clearly have been in the position of incumbrancers to whom notice would have had to be given under section 167, if the plaintiff desired to get possession of the land free from incumbrances. There was no actual conveyance in this case, but it has been held and there is no dispute about it that at all events ever since 1889 the Ghoses have been in possession of this $2\frac{1}{2}$ bighas by means of their tenants who were in fact occupying the $2\frac{1}{2}$ bighas and paying rent to the Ghoses: and,

therefore, as against Pal they have by reason of their possession as against him, obtained title, just as much an effective title as if Pal had in fact conveyed his interest in the $2\frac{1}{2}$ bighas to the Ghoses, and for that reason I am of opinion that the Ghoses were holders of an incumbrance and consequently it was necessary for the plaintiff, if he desired to get possession of the property free from incumbrances to give notice not only to Pal which in fact he had, but, also to the Ghoses which in fact he did not.

The result, therefore, is that the judgment of the Subordinate Judge was wrong, because he held that it was not necessary for the plaintiff to give notice to the Ghoses whereas, in my judgment he was entitled to such notice.

The appeal is, therefore, allowed and the suit dismissed with costs in all the Courts.

We do not intend to decide any thing by this judgment, which would prevent the plaintiff from recovering rent from the Ghoses in a proper proceeding. We do not think we can deal with that matter in this case.

Mookerjee, J.—I agree that the decree of the Subordinate Judge cannot be supported. The facts material for the determination of the question of law raised before us, lie in a narrow compass and may be briefly recited. Under one Chongdar as *talukdar*, the Mookerjees held a *makarari* tenure. In 1886, the Mookerjees created a permanent under-tenure in favour of Pal. In 1889, the Ghoses took possession of $2\frac{1}{2}$ bighas of land included in the tenancy of Pal under the Mookerjees. This adverse possession of the Ghoses against Pal continued for the statutory period; and in 1901, by operation of section 28 of the Indian Limitation Act, the Ghoses acquired a good title to this $2\frac{1}{2}$ bighas of land as against Pal. In 1902, Chongdar brought a suit for arrears of rent against the Mookerjees and obtained a decree. At the sale held in execution of that decree on the 22nd January 1903, the plaintiff purchased the *makarari* tenancy of the Mookerjees under Chongdar. He then took proceedings under section 167 of the Bengal Tenancy Act to annul the encumbrance on the property, that is, the tenancy created in 1886 by the Mookerjees in favour of Pal. The plaintiff, it is conceded, served a notice under section 167 on Pal, and the question in controversy is, whether the notice so served affects the Ghoses.

On behalf of the plaintiff, respondent, it has been argued that he completely fulfilled the requirements of section 167 when he served notice upon Pal and that he was under no obligation to take

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notice of the right, if any, which by operation of law might have been acquired by the Ghoses against Pal. In support of this view reliance has been placed on the decisions in *Womesh v. Raj Narain* (1); *Kristna v. Hari* (2); *Sheo Sohye v. Luchmeshur* (3); *Sharat v. Bhobo* (4); *Gunga v. Asutosh* (5); *Thamman v. Vizianagram* (6) which formulate the doctrine that adverse possession against a tenant is ordinarily not operative as adverse possession against the landlord during the continuance of the lease. This proposition is obviously of no avail to the respondent. The question in controversy is not whether the possession of the Ghoses was adverse to the Mookerjees, but whether the Ghoses have acquired by operation of law the status of encumbrancers within the meaning of section 167 of the Bengal Tenancy Act. The appellants contend that this question should be answered in the affirmative, because they are persons in whom the encumbrance, that is, the sub-tenancy created by the Mookerjees in favour of Pal in 1886, has, as to a portion thereof, become vested. In fact, after the lapse of the statutory period, the position of the Ghoses became that of grantees of $2\frac{1}{2}$ bighas from Pal. Consequently, the notice served on Pal alone is inoperative so far as the Ghoses are concerned and has not in any way affected the interest acquired by them in the sub-tenancy.

It may be pointed out that the transfer of a share of a permanent tenure or under tenure or of a raiyati holding at a fixed rate of rent, is valid under sections 11, 17 and 18 of the Bengal Tenancy Act; although, under section 88, the transferee of the share is not entitled to claim a sub-division of the tenure or holding as against the landlord. The Ghoses, here, do not claim a sub-division of the tenancy as against the plaintiff; all that they assert is that they have acquired an interest in the tenancy created by the Mookerjees in favour of Pal, that they have thus become "incumbrancers" and that they are consequently entitled to notice under section 167. This contention is clearly well-founded on principle and must prevail.

Reference has been made in the course of the argument to the decisions in *Gool v. Debendra Nath* (7) and *Arsadulla v. Mansubali* (8) which recognise the principle that the term 'encumbrance' used in sections 159 and 161 of the Bengal Tenancy Act includes a statutory title acquired by a trespasser by adverse possession of the

(1) (1868) 10 W. R. 15.

(2) (1842) I. L. R. 9 Calc. 367.

(3) (1884) I. L. R. 10 Calc. 577.

(4) (1835) I. L. R. 13 Calc. 101.

(5) (1896) I. L. R. 23 Calc. 663.

(6) (1907) I. L. R. 29 All. 593.

(7) (1911) 14 C. L. J. 126.

(8) (1912) 16 C. L. J. 539.

land of a defaulting tenant. This doctrine has no application to the circumstances of the present case, because the Ghoses claimed title and possession, not against the Mookerjees but against Pal. The true view is that when a person has, by adverse possession against a sub-tenant, acquired a statutory title to a portion of the lands comprised in the sub-tenancy, he has an interest in the sub-tenancy, so that when, on a sale of the superior tenancy for arrears of rent, the purchaser seeks to annul the sub-tenancy as an "incumbrance," such person stands in the position of an "incumbrancer" and is entitled to notice under section 167. In my opinion, this appeal must be allowed and the suit dismissed with costs in all the Courts.

A. T. M.

Appeal allowed: Suit dismissed.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and
Mr. Justice Newbould.*

KALI PRASANNA SIL

v.

PANCHANAN NANDI CHOWDHURY AND OTHERS.*

Res judicata—Withdrawal of suit, order for—Inability to adduce all the evidence at the first hearing—Jurisdiction—Civil Procedure Code (Act XIV of 1882), section 373.

Where the appellate Court allowed the plaintiff to withdraw from the suit on the ground that he had not been able to adduce all the evidence which he would have liked to adduce at the first hearing :

Held, that such order not being contemplated by section 373 of the Code of Civil Procedure, was without jurisdiction and a fresh suit brought in pursuance of that order was barred by *res judicata*.

Kharda Co., Ltd. v. Durga Charan (1) and *Mabulla v. Rani Hemangini* (2) followed.

Appeal by the Plaintiff.

In 1905, the plaintiff brought a suit in respect of the property which was the subject matter of the present suit, asking for the same

* Appeal from Appellate Decree No. 1354 of 1913, against the decree of Babu Ashutosh Banerjee, Subordinate Judge of Burdwan, dated the 12th September, 1912, confirming that of Babu Binod Behari Mukerjee, Munsiff of Kulna, dated the 16th January, 1912.

(1) (1909) 11 C. L. J. 45.

(2) (1910) 11 C. L. J. 512.

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relief which he in this suit asked. That suit was contested, evidence being called on both sides, and the primary Court dismissed the plaintiff's suit. Then on appeal to the lower appellate Court, he applied under section 373 of the Code of Civil Procedure of 1882 for leave to withdraw from the suit *inter alia* on the ground of his inability to produce the necessary evidence in time. Thereupon, the appellate Court made an order to this effect: "The appeal is dismissed with costs and the plaintiff's suit allowed to be withdrawn with leave for fresh action for the same subject matter, if not barred." Thereupon, this suit was brought, and the defendants contended that as the order of the appellate Court was made without jurisdiction, the subject matter of the present suit was *res judicata* by reason of the decision which was given by the primary Court in the previous suit. The Courts below upheld the defendant's contention and dismissed the suit. Hence this appeal.

Babu Mahendra Nath Ray (Babu Manmatha Nath Ray with him) for the Appellant: The order of the appellate Court in the former suit giving the plaintiff permission to withdraw from the suit with leave to bring a fresh one was not without jurisdiction, and consequently was not a nullity and could not be questioned now—it may have been improperly made.

The appellate Court having in the former suit given permission to the plaintiff to withdraw from the suit with liberty to bring a fresh one, the present suit was not barred by *res judicata*: *Rajib Sarkhel v. Rajah Nil Monee* (1); *Chhajjua v. Khyali Ram* (2).

[*Sanderson, C. J.*: Mr. Ray, we will first have to consider the question whether the order was within jurisdiction].

The order was within jurisdiction. The Code itself does not impose any limitation. The Code does not say "shall be allowed only on these grounds"—in which case order on any other ground would have been without jurisdiction: See *Kharda Co., Ltd. v. Durga Charan* (3), where it was held that the order was improperly made. The Court had jurisdiction but this jurisdiction was improperly exercised.

[*Sanderson, C. J.*: Suppose the language of the section had been this wise—withdrawal on (1) (2) but not on (3), what would the effect have been?]

Of course, if the Court in express terms limits the power only to certain grounds—then the order outside those limits will be without jurisdiction: See also *Mabulla v. Rani Hemangini* (4).

(1) (1873) 20 W. R. 440.

(2) (1912) 9 A. L. J. R. 378.

(3) (1909) 11 C. L. J. 45.

(4) (1910) 11 C. L. J. 512.

Babus Biraj Mohan Mojumdar and Baranasibasi Mukerjee for the Respondents were not called upon.

The judgments of the Court were as follows :

Sanderson, C. J.—This is an appeal from the judgment of the learned Subordinate Judge of Burdwan made on the 12th of September, 1913, in which he dismissed the suit of the plaintiff on the ground that the matter was *res judicata*. It appears that the plaintiff brought a suit in the year 1905 in respect of the same property which was the subject-matter of this suit asking for the same relief which he asked for in the present suit. That suit was contested, evidence being called on both sides, and the Court of first instance which heard that evidence dismissed the plaintiff's suit. Then on appeal to the lower appellate Court, and at some stage of that hearing, he applied under section 3; 3 of the old Civil Procedure Code for leave to withdraw from the suit alleging first of all a formal defect, and secondly, his inability to produce the necessary evidence in time. It was admitted by the learned vakil who argued this case for the appellant that, as far as he knew, there was no formal defect proved before the appellate Court, and that the only ground which could be relied upon by the petitioner in that case was the second one, namely, that he had not been able to produce the necessary evidence in time at the trial before the Court of first instance. Thereupon, the appellate Court made an order to this effect: "The appeal is dismissed with costs and the plaintiff's suit allowed to be withdrawn with leave for fresh action for the same subject matter, if not barred." Thereupon, this suit was brought, and the point was taken by the defendant that the order of the appellate Court of the 18th of May, 1906 had been made without jurisdiction and that consequently the subject matter of the present suit was *res judicata* by reason of the decision which was given by the Court of first instance in the previous suit in 1905. The learned Subordinate Judge has upheld that view, and has consequently dismissed the plaintiff's suit, and this appeal has been lodged against the judgment of the Subordinate Judge. In my judgment the Subordinate Judge was right.

The whole question depends upon whether the order of the 18th of May 1906 was made without jurisdiction. If it was within the learned Judge's jurisdiction to make it, but it was a wrong order, then I can quite understand that the learned vakil for the appellant had something to say, inasmuch as the order had been allowed to stand and the defendant against whom the order was made had taken no steps to attack that order. But if it was made without jurisdic-

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tion—and it is brought to our notice now that it was made without jurisdiction—and if we are satisfied that it was made without jurisdiction, then we are bound to say so and also to say that as a matter of consequence all proceedings taken in consequence of that order failed on that ground. Therefore, the only question is whether the order was made without jurisdiction. I think it was. I need not read the section in full. The section says,..... “If the Court is satisfied on the application of the plaintiff (a) that the suit must fail by reason of some formal defect or (b) that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit.....” Now, the words, as they stand in the section, are of course of general application, namely “That there are sufficient grounds for permitting him to withdraw from the suit:” but there are decisions of this Court which, in my opinion, are binding upon us:—It is quite true they are not upon the same section, but they are upon order XXIII, rule 1 of the Civil Procedure Code which is now in operation, but the learned Vakil who argued the case for the appellant admitted that there is no substantial difference between this rule and section 373 of the Old Code.—In the first case, *Khorda Co., Ltd. v. Durga Charan Chandra* (1), it was held by my learned brother Mr. Justice Mookerjee that clauses (a) and (b) of sub-rule (2) have to be read together and that the intention is that a ground included in clause (b) must be of the same nature as the ground specified in clause (a), that is to say, it must be something of the same nature as *formal defect*; and, inasmuch as in that case the ground for allowing the suit to be started afresh was that the plaintiff should be allowed to bring a fresh suit not because there was a formal defect but for some other reason, the order was illegal. Then again the learned Chief Justice Sir Lawrence Jenkins in *Mabulla Sardar v. Rani Hemangini Debi* (2), says “The decision, in *Khorda Co. v. Durga Charan* (1) shows that clause (b) of sub-rule (2) must be read in connection with clause (a) and with the limitations clause (a) suggests, and so reading it, it is clear that it is not within the jurisdiction of a Court of appeal to grant the permission on the terms which have been approved by the Court in this case. In my opinion, this Rule should be made absolute.” Therefore, in the present case, inasmuch as the only ground that can be suggested for the order of the 18th of May 1906

(1) (1909) 11 C. L. J. 45.

(2) (1910) 11 C. L. J. 512.

was that the plaintiff had not been able to adduce all the evidence which he would have liked to adduce at the first hearing, I am of opinion that, that was not a ground which is contemplated by section 373 of the old Civil Procedure Code, and, therefore, the order which was made by the appellate Court was made without jurisdiction. Consequently, that order having been made without jurisdiction a fresh suit should never have been brought, and the defendant was perfectly competent and was within his rights when he raised the point that the matter was *res judicata*. I am of opinion that the lower appellate Court was right in coming to the conclusion that it did, and this appeal must be dismissed with costs.

Newbould, J.—I agree.

A. T. M.

Appeal dismissed.

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CIVIL REFERENCE.

Before Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

ABDUL QUADER KHALIFA

vs.

FRITZ KAPP.*

CIVIL
1916.
April, 3, 11.

Suit, maintainability of—Suit on contract against an alien enemy—Civil Procedure Code (Act V of 1908), Secs. 9, 83—Internment, effect of.

A suit for recovery of money for work done by a British Indian subject during war, is maintainable against an alien enemy under an order of internment, the contract having been made and the breach thereof having occurred during war. Such a suit can be tried before the restoration of peace.

Halsey v. Esmerford (1) referred to.

The internment does not cut down the liability of an alien enemy.

Obiter : An alien enemy can be sued in British India, whether the cause of action arose before or after the war, and has every right to present his case before the Courts in accordance with the laws of procedure.

* Reference No. 1 of 1916 by Babu Sarat Chandra Ghosh, 4th Munsiff of Dacca, dated the 30th September, 1915, under Sec. 113 and O. 46, R. 1 of the Code of Civil Procedure in Small Cause Court Suit No. 154 of 1915.

(1) (1916) 1 K. B. 143.

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Reference under Sec. 113 and O. 46, R. 1 of the Code of Civil Procedure.

The plaintiff, a tailor, sued an interned German for realisation of the costs of some tailoring work done by him for the defendant amounting to Rs. 19-14-0. The contract was entered into after the declaration of war but completed before the internment of the defendant. The defendant at first entered appearance through a pleader but subsequently he being removed from his original place of internment by the Government, the learned pleader received no further instructions from his client. When the case came on for hearing, the plaintiff was asked by the learned Small Cause Court Judge to show that it had jurisdiction to entertain it. The learned Judge feeling some doubt, referred certain questions for the decision of the Hon'ble High Court by the following order of

REFERENCE.

The plaintiff Abdul Quader Khalifa a Mahomedan British subject of this town of Dacca, has sued Mr. Fritz Kapp, residing in this town at the time of the institution of this suit, for Rs. 19-14-0 due as charges for the making of cotton wearing apparel &c. The defendant is a German and not a naturalized British subject. This suit was instituted on 23rd August 1915, i.e., long after the declaration of war between His Majesty's Government and the Government of the Emperor of Germany. The defendant had a business in photography which was closed after the declaration of the war. At the time of the service of summons upon the defendant he was at Dacca and within the jurisdiction of this Court, but under orders of internment. He was interned once before but was allowed to return to Dacca. The defendant appeared in Court personally in obedience to the summons and wanted to compromise but the parties ultimately could not agree and hence the case is pending for trial. The defendant's pleader has informed this Court that the defendant is not in the house in which he used to reside and that possibly he has been interned at some place near Darjeeling. He could not thus communicate with his client.

The case set out in the plaint is (1) "that the plaintiff was in the habit of doing tailoring business for the defendant and also supply him with materials according to his directions, since some years"; and (2) "That in November 1914, the defendant cleared his dues to the plaintiff up to October 1914". The present claim for Rs. 29-2-0 is for the work done in November and December 1914 within this town of Dacca.

The plaintiff was asked by this Court "to show that this Court has jurisdiction to entertain and try this suit during the pendency of the war." Thereupon the plaintiff's pleader cited two cases reported in the Notes portion of the Calcutta Weekly Notes which will be noticed presently.

There is no provision in the Code of Civil Procedure as to what should be the procedure in case of a suit against an alien enemy. Section 83 of the Code provides that alien enemies residing in British India with the permission of the Governor-General in Council may sue in the Court of British India, as if they were subjects of His Majesty. The provision does not necessarily imply that a suit against an alien enemy is maintainable.

It is not disputed that the defendant is an alien enemy. "Alien enemy is a subject of a nation which is at war with this country"—Wharton's Law Lexicon. Alien is a person born in a foreign country, out of the allegiance of the British Crown. He is a foreign-born resident of a country, in which he has not citizenship—Webster's Dictionary. Thus the defendant is an alien enemy at present residing in this country under order of internment at the time of the institution of this suit, and now actually interned. Thus he is not treated as if he is a British subject, and is not residing in this country under a license. He is not allowed to carry on his business as a photographer. He is thus under restraint as an enemy.

The question naturally arises whether he is subject to the law in force in British India, i.e., whether he is bound by the provisions of the Indian Contract Act and the Code of Civil Procedure. The answer to the question is not free from doubt. It seems to me at the date of the suit and under the circumstances in which he has been placed they are not applicable to him. For it is said in Austin's Jurisprudence at page 144, that "A positive law is set or directed exclusively to a subject or subjects of its author or that a positive law is set or directed exclusively to a member or members of the community wherein its author is sovereign * * *. Living within the territory, he (a stranger) is liable to be reached by the legal sanctions by which the law is enforced." Being under order of internment the defendant cannot be said to be living in British India—he is rather compelled to live here and he has got little freedom of action or of movement.

The defendant does not fall within the definition of the term "enemy" as defined in the Proclamation of 10th August 1914, or in the Proclamation of 30th September 1914. Besides the term

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"enemy" is used in those Proclamations for the purposes of those Proclamations only.

Then as to an alien enemy's liability to be used in England the earliest case decided after the declaration of the present war is the case of *Robinson & Co. v. Continental Insurance Co.* (1). It was decided on 16th October 1914 by Mr. Justice Bailhache and noticed in 19 C. W. N. p. viii. It is stated in the note that his Lordship held that "to hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief. * * * I am of opinion that the rule is confined to cases in which the alien enemy is plaintiff and that war does not suspend an action against a defendant alien enemy. The next question is—can he appear and defend either personally or by counsel? I think he certainly can * * * I have come to the conclusion that there is no rule of the Common Law which suspends an action in which an alien enemy is defendant and no rule of Common Law which prevents his appearing and conducting his defence" In this case the cause of action arose before the war and the pleadings were closed before the war.

The next case is *W. L. Ingle Ltd. v. Mannheim Insurance Co.* (2) (reproduced in Contemporary Law Review, Vol. IV, p. 20), decided by the same Judge. In this case the cause of action arose after the declaration of the war but before the Proclamation of 8th October 1914. It was held that the Proclamation was not retrospective and that the right of suit accrued before the date of that Proclamation. In this case his Lordship observed that "In the case of individuals and at common law the question whether a man is to be treated as an alien enemy for the purpose of his contracts, rights of suit, and the like, does not depend upon his nationality, or even upon his true domicile, but upon whether he carries on business in this country or not. If he does it is not illegal even during war to have business dealings with him in this country in respect of the business which he carries on here. He is not in respect of that business divided by the war line, but has what is sometimes called a commercial domicile here" [England]. In the present case the defendant has no commercial domicile within the meaning of the passage quoted. Besides it is doubtful if the common law of England referred to in the above two rulings is applicable to India. It has never been introduced into the Mofussil at least [Interpretation

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of Indian Statutes*, p. 159, on the authority of *Ameer Khan's case* (1) ; *Srinath v. Dinabandhu* (2)].

The next and last case cited is the case of *Porter v. Freudenberg* (3), decided on the 19th January 1915 by the Court of Appeal in England and reported in 19 C. W. N. lxxviii. In this case it is not clear from the report whether the cause of action arose before or after the declaration of war, and before or after the Proclamation of 8th October 1914. It was held broadly approving the decision in *Robinson & Co. v. Continental Insurance Company* (4), that an alien enemy can be sued, that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. In coming to this conclusion their Lordships quoted with approval the following passage from Blackstone's Commentaries, 2nd Edition, Vol. 1, Ch. 10, p. 373 :— "Alien enemies have no civil rights or privileges, unless they are here [England] under the protection and by permission of the Crown" and held he cannot enforce his civil rights as a plaintiff. "Every right is the creation of law. And, though every obligation and sanction does not imply a right, every right implies an obligation and a sanction."—Austin's Jurisprudence, p. 160. "A relative duty is incumbent upon one party, and answers to a right residing in another party."—p. 161. If it be said that the alien enemy has no civil right no one can do him any civil wrong. If he has no civil right he has no right to exercise his civil right, to defend himself. A right to be heard in defence is a civil right created by statute. For it is provided in order 8, rule 1 of the Code of Civil Procedure that "the defendant may, and, if so required by the Court, shall at or before the first hearing or within such times as the Court may permit, present a written statement of his defence." If he has no civil right he, as defendant, cannot get costs or execute his decree for costs. Still more anomaly will be created if he be allowed to put his judgment-debtor a British subject to jail for non-payment of such costs. If these and like consequences be taken into consideration, the rule that he has got no civil right should have no qualified meaning ; for otherwise anomalies in the administration of justice are created. It seems to me from the notes on his Code of Civil Procedure by

* by A. N. Ghosh and S. C. Ghosh—Rep.

(1) (1870) 6 B. L. R. 392.

(2) (1914) 20 C. L. J. 385 ; I. L. R. 42 Calc. 489 (525) P. C.

(3) (1915) 19 C. W. N. lxxviii.

(4) (1914) 31 T. L. R. 20.

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Mr. S. C. Roy, B.A., LL.B. (Cantab), Bar-at-Law, that there is no English statutory rule corresponding to order 8, rule 1 of the Code of Civil Procedure quoted above.

In the English cases cited above it appears the decisions were based more or less on the absence of any Common Law there; and no reference was made to the International Law, which seems to me to be the true guide where the defendant being an alien enemy is not allowed to carry on any business and is under order of internment or is actually interned; as restraint is put upon his civil right to work and earn his livelihood and to do all lawful acts lawfully to that end. He cannot be said to be residing in this country with implied or express permission of the Government of India or of the Crown. In such a case the reasonable rule seems to be that "remedy only remains suspended and revives on the restoration of peace." Halsbury's Laws of England, Vol. 1, p. 311; and in my opinion this rule is to be taken liberally, i.e., whether the alien enemy is the plaintiff or the defendant, and, as in this case, the contract having been completed during war, no cause of action can arise until peace is restored.

As to the rule laid down in the last English case, the circumstances being not quite similar, I doubt how far it is binding upon the Courts in India, which are to decide according to justice, equity and good conscience, and are to be guided by the principles of English law applicable to a similar state of circumstances, although the English law is not obligatory upon the Courts in the Mofussil.—(Interpretation of Indian Statutes, pp. 333 to 335).

I therefore beg to submit for the decision of the Honourable High Court :

1. Whether this suit for work done by a British Indian subject during war is at present maintainable against an alien enemy, under order of internment, the contract having been made and the breach thereof having occurred during war?

2. Whether the trial or hearing be suspended until restoration of peace?

No one appeared in support of the Reference.

April, 8.

Babu Ram Charan Mitra appeared to oppose the Reference. The suit is maintainable: *Robinson & Co. v. Continental Insurance Co.* (1). Section 83 of the Code of Civil Procedure contemplates

the case of an alien enemy as plaintiff and not as defendant. Reading Sec. 9 along with Sec. 83 and considering there is no prohibition, express or implied, in the Code as to the maintainability of suits against alien enemies, the present suit is maintainable.

The provisions of the Code in this matter are not exhaustive. The Code is only exhaustive in matters regarding which there is any express provision. See *Porter v. Freudenberg* (1); and *Fritz Olier v. Lavezso* (2).

The contract being for the supply of the necessities of life, is a valid one. The contract is enforceable as contracts by infants and other disqualified persons for the necessities of life. The plaintiff, a British subject, who did the work for the defendant and supplied the articles, should not suffer.

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The judgment of the Court was as follows :

The plaintiff is a British Indian subject, a tailor, in the town of Dacca. The defendant, a subject of the German Emperor, was a photographer in that town. In November 1914, *i.e.*, after the declaration of war with Germany, the plaintiff did some tailoring work for the defendant, and the present suit was brought for the recovery of wages &c. due on that account. The question referred is whether such a suit would lie during the pendency of the war. We think the suit would lie, and there is nothing in law to prevent its being tried before the restoration of peace.

Section 9 of the Civil Procedure Code provides that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits the cognizance of which is expressly or impliedly barred. Section 83 provides that alien enemies residing in British India with the permission of the Governor-General in Council may sue in the Courts of British India but an alien enemy residing in British India without such permission shall not sue in such Courts. There is no provision in the Code barring suits against alien enemies and we see no reason why such suits should not be heard and decided during the continuance of the war. No matter whether the cause of action arose before the war or after the war an alien enemy can be sued in our Courts and would have every right to present his case before the Courts in accordance with the laws of procedure. The latest case in England is that of *Halsey and another, v. Lawenfeld* (3). In that case Mr. Justice Ridley held after dis-

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(1) (1915) 19 C. W. N. lxxviii.

(2) (1884) 1 L. R. 10 Calc. 878.

(3) (1916) 1 K. B. 143.

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cussing previous cases that a suit for rent accrued due after the declaration of the war was maintainable in the British Courts against an alien enemy. We see nothing in our own Code of procedure to prevent us from taking the same view. The fact that the defendant has been interned does not make any difference as the object of internment is to prevent him from doing mischief and not to cut down his liabilities. The case, therefore, must be tried in due course of law.

A. T. M.

Suit maintainable.

APPELLATE CIVIL.

Before Mr. Justice Chaudhuri and Mr. Justice Newbould.

KRISHNA CHANDRA GHOSH

v.

RASIK LAL KHAN AND OTHERS.*

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February, 2, 11.

Feeding the estoppel—Applicability to transactions before 1872—Hindu conveyances—Transfer of Property Act (IV of 1882), Sec. 43—Evidence Act (I of 1872), Sec. 115.

The equitable principle laid down in section 43 of the Transfer of Property Act is applicable to transactions before 1872.

When a grantor, by a recital, is shown to have stated that he is seised of specific estate, and the Court finds that the parties proceeded upon the assumption that such an estate was to pass, an estate by estoppel is created between the parties and those claiming under them, in respect of any after-acquired interest of the grantor, the newly acquired title being said to 'feed the estoppel'. This principle of 'feeding the estoppel' is applicable to Hindu conveyances and to cases before the Evidence Act.

Dooli Chand v. Birj Bookun (1) explained.

Kurn Chowbey v. Jankee Pershad (2) and *Kanee Abdool v. Buroda Kant* (3) referred to.

Appeal by the Plaintiff.

Suit for ejectment.

Under one Bisseswar Banerjee, the Jugi brothers were tenants. On the 27th Magh 1272 (24th January, 1866) the latter created a *mokarari* jama of 4 cottas out of the plot of about 4 bighas in their possession in favour of the ancestor of the defendants. Bisseswar brought a suit in 1866 for enhancement of rent against the Jugi brothers and obtained a decree. The landlord asserted that the Jugis held the land without a lease and without giving a *Kabuliat*. The suit was decreed and eventually two of the brothers A and B, gave up their tenancy. The remaining two brothers, C and D then obtained a settlement in *mokarari mourashi* of 18 cottas, half of which passed to the plaintiff by a registered *Kabala* dated the 22nd Jaistha 1292 (3rd June 1885) from the representatives of C and D. The question was whether the plaintiff could eject the defendants on the ground that at the time of the grant of potta to the

* Appeal from Appellate Decree No. 3114 of 1912, against the decree of Babu Bidhu Bhusan Banerjee, Subordinate Judge, 2nd Court of Hooghly, dated the 17th July, 1912, modifying that of Babu Paroda Kinkar Mukherjee, Munsiff, 3rd Court at Howrah, dated the 26th June, 1911.

(1) (1880) 10 C. L. R. 61; 6 C. L. R. 528.

(2) (1866) 1 Agra. H. C. 164.

(3) (1871) 15 W. R. 394.

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defendants' predecessors, the grantors had no title, the plaintiff having derived his title from two of them. The lower appellate Court held that the plaintiff was estopped. Hence this appeal.

Babus Bepin Behary Ghose and Manmohan Ghose for the Appellant.

Babus Mahendra Nath Ray and Manmatha Nath Ray for the Respondents.

C. A. V.

The judgment of the Court was delivered by

February, 11.

Chaudhuri J—The plaintiff sues for declaration of title to a nine cotta plot of land and for ejectment. He bases his claim upon a registered Kobala executed by one Ramani Dassee, dated the 22nd Jaistha 1292, by which she sold the southern half portion of a plot of land measuring in all 18 cottas. He complains that the defendants have, under colour of a potta (Ex. B) alleged to have been granted to their maternal grand-mother Bilashmoyee Dassee, by certain persons hereinafter referred to as the Jugi brothers, dated the 27th Magh 1272, taken possession of a portion of plot in suit and erected structures thereon. The Jugi brothers were tenants under one Bisseswar Banerjee. They were in possession of 3 bighas 14 cottas. Their landlord brought a suit in 1866 for enhancement of rent against them and obtained a decree. The landlord asserted that the Jugis held the land without a lease and without giving a kabuliyat. The suit was decreed and eventually two of the brothers, namely, Iswar Chandra and Dinonath, "gave up their tenancy." The remaining two brothers Srimanta and Dukhiram then obtained a settlement in mokarari mourashi of 18 cottas, half of which has now passed on to the plaintiff. It appears that the four Jugi brothers by a deed, dated 27th Magh 1272, purported to create a mourashi jama of 4 cottas out of the plot of about 4 bighas in their possession in favour of Bilashmoyee. The plaintiff's case in the plaint was that these 4 cottas had nothing to do with his 9 cottas and were outside the area. He placed the four cotta plot between the southern boundary of his plot of 9 cottas, and north of a tank known as the Hansa tank. The defendants' case is that their 4 cottas cover the disputed land.

In the first Court the following issues were raised, relating to this matter.

5th—Has the plaintiff his alleged right, title and interest in the land in suit?

6th—Does the land mentioned in the potta cover the disputed land?

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Chandhuri, J.

The learned Munsiff held that the plaintiff had established his right to 9 cottas. He held further that the disputed land was not covered by Bilasmoyee's potta relied upon by the defendants. The defendants appealed. The only points submitted before the first appellate Court were (1) that the plaintiff's title had not been proved, (2) that the lower Court should have found that the disputed land was included in the potta. The learned Subordinate Judge agreed with the first Court in holding that the plaintiff had established his title; but he held that the learned Munsiff was wrong in finding that the north bank of the tank was included in the potta. He found that the land lying south of a straight line drawn from the southern corner of Nriya Lal Ghose's land shown in the Amin's Map, right up to the side of the drain which is to the east of Bantra Road was the northern limit of the defendants' land covered by the potta, and in that view he directed that the plaintiff was to get khas possession of the land lying north of that straight line by demolition of the structures erected by the defendants, but that the plaintiff was not to get khas possession of the land which lies to the south of that straight line, as being covered by the potta Exhibit B. It will be seen that the above findings dispose of the issues raised in the case. It appears however that the learned vakil for the plaintiff respondent in the first appellate Court during his argument, contended that the Jugi brothers had no right to grant a mourashi mokarari potta to Bilashmoyee, as they had merely a *titia* right, and therefore the defendants had not derived any title to the 4 cottas. This was not one of the issues raised, but the learned Subordinate Judge dealt with this argument and held that when Srimanta and Dukhiram eventually secured a mourashi mokarari right to 18 cottas and inasmuch as the plaintiff derived his title from them, the plaintiff was estopped under section 115 of the Evidence Act from denying Bilashmoyee's potta, who also derived her title from Srimanta and Dukhiram and their brothers, and that section 43 of the Transfer of Property Act was also in favour of the defendants. He held that although these Acts had come into force after the potta, the equitable principles embodied in the above sections were applicable. In this Court the main argument has been based upon this portion of the judgment. It is strenuously contended that the learned Subordinate Judge has erred in dealing with this question in this manner.

The argument has proceeded under these heads :—(1) That the Jugi brothers did not possess a mokarari right in 1292 and were not

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competent to create an under-tenure. Therefore, Bilashmoyee acquired nothing under her potta Ex. B, dated 27th Magh, 1272.

(2) That the principle of estoppel has no application in a case where there is originally no title at all, but only in cases where there is an enlargement of an existing interest.

(3) That after the landlord's suit for enhancement of rent, the Jugi brothers took a fresh settlement of 18 cottas from the zemindars. It was a fresh transaction not affected by any estoppel, but even if there were any estoppel, they could only be called upon to discharge their liability to the extent of one-half of the 4 cottas purported to have been granted by the four brothers jointly, and inasmuch as the defendants had already two cottas outside the land in dispute, they were not entitled to claim anything more from the land in dispute.

(4) That the plaintiff being in the position of a *bona fide* purchaser for value without notice of any such claim, is not bound to recognise it.

No issue as to the plaintiff being in the position of a *bona fide* purchaser without notice was raised in the two Courts, and it is too late now to raise it. The plaintiff chose to rest his case in both Courts on the issues above-mentioned, and the findings of the first appellate Court dispose of them. That Court however has entered into a discussion of some of the above points placed before him during argument and we shall therefore deal with them.

It is clear that the Jugi brothers had no mokarari mourashi tenure from the zemindar at the time they granted a mokarari potta to Bilashmoyee. It is also clear that they made a false representation when they brought the grantee to the land which was then in their possession. Two of them then gave up possession and the remaining two took a fresh settlement of 18 cottas in mokarari mourashi. Apparently the defendants and their predecessors remained on the land throughout, and the simple question is, can the plaintiff now eject them on the ground that at the time of Bilashmoyee's potta, the grantors had no title, the plaintiff having derived his title from two of them. If those two were estopped, the plaintiff also is. "Could those two be called upon to make good their representation when they actually acquired the right to grant a sub-mokarari? We do not think there is any doubt that they could be so called upon. It is contended that the principle of "feeding the estoppel" is not applicable to Hindu conveyances, at least to cases before the Evidence Act, and *Dooli Chand v. Birj*

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Bookun Lal Awasti (1) is cited in support of this proposition. That case turned upon the effect of a petition in which the petitioner disclaimed all interest in an estate in which she had at that time only an expectant right, but to which she became afterwards entitled absolutely. It was contended that it raised an estoppel, and that the petitioner must be taken to have abandoned her right to the property. Their Lordships found that there was no reason to suppose that by the petition the petitioner in any degree contemplated a conveyance of her rights. There was no consideration for the conveyance suggested. There was no misrepresentation by her to the defendant, who had raised the question of estoppel, who was himself aware of the real facts of the case. The passage in the judgment in *Dooli Chand v. Birj Bookun Lal Awasti* (1) that the principle of English Law which allows a subsequently acquired interest to feed, as it is said the estoppel, does not apply to Hindu conveyances, appears to be merely an observation in answer, to an argument based upon the case which was cited in the courses of argument namely, *Mussumat Oodey Koorwur v. Mussumat Ladoo* (2). It seems to be an *obiter* and the exact significance of the expression "Hindu Conveyance" is not also clear. There is however ample authority to be found in Indian cases respecting leases for the following proposition, that when a grantor, by a recital, is shown to have stated that he is seised of specific estate, and the Court finds that the parties proceeded upon the assumption that such an estate was to pass, an estate by estoppel is created between the parties and those claiming under them, in respect of any after acquired interest of the grantor; the newly acquired title being said "to feed the estoppel." See *Kurn Chowbey v. Jankee Pershad* (3); *Kasee Abdool Mannah v. Buroda Kant Banerjee* (4) both of them before the Evidence Act and the Transfer of Property Act.

What the learned Judge meant to hold was that the above principle applied to the present case, and we agree with that view. Learned vakeel's second contention before us does not appear to us to be sound. See amongst others *Doe D Prior v. Ongley* (5); *Darlington v. Pritchard* (6); *Green v. James* (7); *Goodtitle v. Morse* (8), and *Sturgeon v. Wingfield* (9). The two Jugi brothers

(1) (1880) 10 C. L. R. 61; 6 C. L. R. 528.

(2) (1870) 13 M. I. A. 585.

(3) (1866) 1 Agra H. C. 164.

(4) (1871) 15 W. R. 394.

(5) (1850) 10 C. B. 25.

(6) (1842) 4 Man. & G. 783.

(7) (1840) 6 M. & W. 656.

(8) (1789) 3 T. R. 371.

(9) (1846) 15 M. & W. 224.

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were parties to the false representation originally made and they could be called upon to make good such representation to the extent of their capacity. They could be heard to say that although they had ample land out of which the entire 4 cottas could be treated as having been granted in mokarari, that each of them could only be called upon to contribute 1 cotta each. We do not think that contention is sound.

The first Court held that the defendants had failed to prove adverse possession and the appellate Court was of opinion that the defendant's possession was to be held as following the plaintiff's title, and that the plaintiff's claim to khas possession was barred by 12 years' limitation.

We accept the findings of the appellate Court and the principles of law held applicable by it. *Hirsmoti Dassya v. Annoda Prosad Ghosh* (1) is relied upon for the proposition that as the plaintiff has proved his title as owner, it is for the defendant to prove his title to remain as a tenure-holder. We think the defendants have established that the plaintiff is not entitled to khas possession of the piece of land to the south of the line drawn by the Judge. The appeal will therefore be dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1908) 7 C. L. J. 553.

Before Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

ANANDA KUMAR BHATTACHARYA

v.

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1916.

January, 5, 6, 7
& 31.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Regulation II of 1805, section 11, sub-section (2)—Revenue, assessment of—Limitation—Date, from which limitation runs—Right of assessment, if barred—Assam Land and Revenue Regulation (I of 1886), section 28, Proviso, Cl. 2 and 4, construction of—Statute, retrospective effect of—Indian Evidence Act (I of 1872), section 65—Public document—Secondary evidence.

*Per Chatterjee, J. :—*A right to assess revenue on lands held exempt from the public revenue will be barred unless claims on the part of Government be regularly and duly preferred, as provided by Regulation II of 1805, at any time within the period of 60 years from and after the origin of the cause of action.

* Appeal from appellate decree, No. 3695 of 1913, against the decision of P. K. Chatterjee, Esq., Additional District Judge of Sylhet, dated the 10th July, 1913, affirming that of Babu Kailash Chandra Sen, Subordinate Judge, 2nd Court, of Sylhet dated the 25th May, 1912.

Boddupalli Jagannaihan v. The Secretary of State for India in Council (1) distinguished.

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Where the predecessors in title of the plaintiff claimed a lakheraj title to the land in dispute at the time of the Permanent Settlement in 1793, and the Government had to abstain from making a settlement, and where also it appeared that in 1842 there was a resumption of the land by the Revenue authorities, that is to say, a decision by the Revenue Board that the land was assessable to revenue, and the collector did not proceed to assess revenue :

Held, that 60 years having expired from either of the two dates the claim of the Government to assess revenue was barred.

Per Curiam : Clause (4) of the proviso to section 28 of the Assam Land and Revenue Regulation applied to the case, and as such the land having been held revenue-free for more than 60 years, the right of assessment was barred.

Per Chatterjee, J. : Clause (2) of the proviso of section 28 of the Regulation would authorise the assessment of lands excepted from the Permanent Settlement if they were not saved by any of the other exempting clauses of the Proviso.

Every legislation must be considered as prospective unless anything to the contrary is expressly or by necessary implication provided. But a statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing.

The Queen v. The inhabitants of St. Mary, Whitechapel (2) referred to.

Per Beachcroft J. : The rule laid down in section 65 of the Indian Evidence Act, that the only secondary evidence admissible of the contents of a public document is a certified copy thereof, is subject to the rule that when the original has been destroyed or lost any secondary evidence may be given.

Appeal by the Plaintiff.

Suit for a declaration that the plaintiff had a revenue-free title to the property in suit and the defendant, the Secretary of State for India, had no right to assess revenue upon it.

The material facts will appear sufficiently from the judgment of Chatterjee J.

Babus Bepin Behary Ghose and Brojolal Chakravarty for the Appellant.

Mr. Kenrick (Advocate-General) and *Babu Ram Charan Mitra, (Senior Government Pleader)* for the Respondent.

C. A. V.

The following judgments were delivered :—

D. Chatterjee, J.—This was a suit for a declaration that the plaintiff had a revenue-free title to the property in suit and the defendant the Secretary of State had no right to assess revenue upon it. Both the Courts below have dismissed the suit and the plain-

January, 31.

(1) (1903) I. L. R., 27 Mad. 16.

(2) (1848) 12 Q. B. 127.

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tiff appeals mainly on the grounds (1) that there is no evidence of any resumption decree having been passed in favour of the Government in 1842, and the findings based on the existence of such a decree are bad: (2) that assuming that there was such a decree or a resumption by the Revenue authorities no action having been taken upon the same for more than 60 years the right of the Government is barred: (3) that the plaintiff having held the property without payment of revenue for more than 60 years, no assessment can be made by reason of clause 4 of the proviso to section 28 of the Assam Land and Revenue Regulation 1 of 1886.

Before discussing these points I may shortly state the facts that are admitted or found. The disputed property which was formerly a tank and has now silted up was owned by certain Mohammedans who in 1806 sold it to the ancestor of the plaintiff: the deed of sale does not state that the property was lakheraj and there is no documentary evidence of a grant in lakheraj right. The defendant admits that Kaslea Beniachong, the mehal in which the disputed property is situate, was excepted from the Permanent Settlement in 1793 as the then holders of the same claimed a lakheraj right. The plaintiff admits that there was a measurement in 1839-40 with a view to resumption. The defendant says there was a resumption suit in 1842 which was decided in favour of Government. Neither the decree nor an attested copy of the same is forthcoming, but there are recitals of a resumption case and decree in a number of papers including a kabuliat by the father of the plaintiff but not in respect of the disputed land. These documents make out a resumption of the mehal in 1842 but it does not necessarily follow from that, that the disputed land was included in the resumption. Next in point of time is the Thakbust Proceeding Exhibit 3 produced and proved by the plaintiff. Under the heading Number-Touji and name of Mehal we find the entry is "Non-settled resumed Mehal," and under the heading "the Mehals which have been enclosed by boundaries or plotted," we find No. 170 the disputed property, and under the heading of "Remarks" we find that the name of the Government was originally recorded as the owner in possession but was removed on the objection of the plaintiff's ancestor whose name was recorded instead. It is contended by the learned Advocate General that this document being filed by the plaintiff it operates as an admission of the title of the Government in 1861. I do not see how this may be. The description of the mehal as a resumed mehal was made by the Thak Authorities, and not by the plaintiff or

his ancestor. It was not the business of the Thak authorities to decide whether a particular piece of land was resumed or not : they took the name as it was given by the Government revenue authorities who succeeded in getting an entry as owner in possession but that entry was expunged on objection by the plaintiff's ancestor. The enclosing by boundaries of the disputed plot also does not show that it was resumed, for lakheraj lands were as a matter of fact enclosed by boundaries during the thak. Even if the description of the mehal as resumed mehal could apply to the disputed plot there is nothing in this to shew that it was resumed under a decree of the civil Court. This is all the evidence that we have of a resumption decree as it is called. I do not see my way to adopt this view and I think the appellant is right in contending that there is no evidence of a resumption decree in 1842 in respect of the disputed land.

There was however admittedly an attempt at resumption. The resumption Chitta is clear evidence of that and we may take it there was a resumption by the Revenue authorities i.e. to say a decision by the Revenue Board that the land was assessable to revenue. Section 21, cl. 4, Reg. II of 1819 provides that upon such a decision by the Board the duty of the Collector would be to make an assessment after notice to parties. See also section 23, Regulation II of 1819. There is no provision in this Regulation as to the time within which this assessment was to be made. Now this Regulation was modified by section X of Regulation III of 1828 which directed the assessment to be made at once and that if the owner declined to pay he must be dispossessed. In the present case there was no immediate assessment and the owner was allowed to continue in possession. It is said that this was so because the land was a tank and unfit for settlement. The learned Judge says this is clear from Exs. V & T. I do not see how this is so. Ex. T describes No. 2532 as a tank and gives its boundaries and Ex. V does not mention 2532 at all. If Ex. T shews anything it shews that the property was a tank which would ordinarily be more valuable than waste land. Then again the learned Judge says the possession of the plaintiff was permissive but that was never the case of the defendant who only said that no assessment was made of tanks, *Gopathis* and waste lands as unfit for settlement and as no one applied for them. The finding of the character of plaintiff's possession therefore is against the case of the defendant and is an inference which as far as I can see is not supported by evidence. On the other hand if the defendant

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had a right to dispossess the plaintiff in 1842 and did not exercise its right the possession of the plaintiff became adverse to the defendant from that time. That possession continued for more than 60 years and the defendant's right of recovery of possession is lost. It is said however that the right to assess revenue is a sovereign right and cannot be lost. Reliance is placed in support of this view on the case of *Boddupalli Jagannadhan v. The Secretary of State* (1). With great respect to the learned Judges I do not feel at all pressed by the opinion expressed in that case in favour of a sovereign right of assessment. The particular Madras Regulation XXV of 1802 which was the subject matter of discussion expressly reserved the right of Government to continue or abolish exemptions from the payment of revenue and no question of prerogative was pertinent. The unreported case relied on by the learned Judges goes perhaps a little further, but there it was stated that "no limitation is placed on the exercise of that right by any statute or law." That was probably so in Madras. In Bengal however, we find that there is such a statute. Sub-section 2 of section 11 of Regulation II of 1805 is to the effect that "all claims on the part of Government whether for the assessment of land held exempt from the public revenue without legal and sufficient title to such exemption or for the recovery of arrears of the public assessment or for any other public right whatever (the judicial cognizance of which may not have been otherwise limited by some special rule or provision in force) shall be heard, tried and determined etc. if the same be regularly and duly preferred at any time within the period of 60 years from and after the origin of the cause of action."

The origin of the cause of action was in 1793 at the time of the Permanent Settlement when the predecessors in title of the plaintiff claimed a lakheraj title and the Government had to abstain from making a settlement. If the proceedings of 1842 declared the land liable to assessment the Collector should have proceeded to assess at once but he did not. Whether we count 60 years from 1793 or from 1842 the claim of the Government is barred. This disposes of the second question.

The last question argued is that the assessment is barred by section 28 of Assam Regulation I of 1886. That section enacts that all land shall be liable to assessment except land expressly exempted and land for which a tax is levied under section 47: "Provided that nothing in this section shall authorize the assessment

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of any land which has been held revenue-free for sixty years continuously unless it is shown that the right so to hold it has ceased to exist."

The land in this case has been admittedly held revenue-free for more than 60 years and the Bengal Regulations under which assessments were previously made being repealed by this Regulation as to Assam and the operation of this section being excluded by the said proviso there would be no law under which the disputed land could be assessed.

The learned Judge however thinks that to apply this section to the present case would be to give a retrospective effect to it and that 60 years have not elapsed from 1886. It is true that all legislation must be considered as prospective unless anything to the contrary is expressly or by necessary implication provided. But a statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing: See *Queen v. St. Mary, Whitechapel* (1). If the proviso is considered to be an enacting part of the section, which it apparently is not, it operates on the state of things that it finds existing on its promulgation. If it finds that a particular piece of land answers to the description contained in its wording it operates by excluding it from the operation of the enacting part.

But the matter may be looked at from another point of view. The proviso excepts a particular class of lands from the operation of the enacting part of the section. The enacting part therefore does not apply and no retrospective effect is given to any enactment.

In the next place it may be said that it does not take away or affect any vested right: it declares what the legal position of these lands was at its passing. The limitation Regulation had barred the right of assessment in such cases and it was thought proper to add this proviso just for the purpose of preventing misconception and dispute.

The second clause to the proviso might at first sight appear to authorise the assessment of the disputed lands as excepted from the Permanent Settlement.

In construing that clause however it must be remembered that the Regulation was originally passed for the province of Assam where the Permanent Settlement came very much later where it did come, and in many places it has not come even now so that it cannot be said that the assessment of lands excepted from the Permanent

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Settlement in 1793 was contemplated in 1886 after more than 93 years. Clause No. 2 of the proviso therefore would authorise the assessment of lands excepted from the Permanent Settlement if they were not saved by any of the other excepting clauses of the proviso, and in the present case clause 4 has saved them.

In this view of the case I would allow the appeal and decree the suit with costs in all Courts in the following manner that it be declared that the disputed land is not liable to be assessed with revenue and the Secretary of State be enjoined not to realise the sum claimed in the notice of December 1908. If the amount has been realised it will be refunded to the plaintiff.

Beachcroft J.—As regards the first joint argued on behalf of the appellant, I am not prepared to say that there is no evidence that the land was resumed in 1842. There is no doubt that there was evidence before the learned Judge that resumption proceedings were taken in respect of the whole of Beniachong, in which area was included the subject matter of dispute, and that this particular piece of land, then a tank, figured in the resumption chitta. Then the learned Judge says "the Rubokari (Ex. V.) shows besides that the plaintiff or his father preferred no objection with regard to the disputed tank." It has not been suggested that this is an incorrect statement of the contents of the exhibit, nor has it been taken as a ground of appeal that the learned Judge has in this passage misstated the evidence. An extract from this exhibit has been printed. It mentions that objections were made in respect of some lands. But the whole exhibit has not been placed before us, and though in the portion printed there is no mention of this particular plot, there is no reason to suppose that the portions not printed, to some passage in which the learned Judge presumably refers, do not bear out his statement of their contents.

It was urged that as under section 65 of the Indian Evidence Act the only secondary evidence admissible of the contents of a public document is a certified copy, there was no evidence of the contents of the resumption decree. But that rule is obviously subject to the rule that when the original had been destroyed or lost any secondary evidence may be given.

The appeal must however in my opinion succeed on the ground that the assessment complained of is barred by section 28 of the Assam Land and Revenue Regulation, 1886. It is argued for the respondent that the right of Government to assess land revenue, which as is pointed out in the preambles to Regulations XIX and XXXVII of 1793 is based on the ancient law of the

country, can never be barred. As to the proposition stated in those general terms it is not necessary to express an opinion. For it is clear that Government can divest itself of the right to assess revenue and can make such regulations for the guidance of its officers as will have the same practical result as a renunciation of the right to assess revenue. Now the Assam Land and Revenue Regulation has repealed the Bengal Regulations so far as they apply to territories to which the Regulation has been extended, so the only provisions for assessment of land revenue extant in Sylhet are those to be found in the Regulation itself. Section 28 provides that all land shall be deemed liable to be assessed to revenue, subject to exceptions in favour of two classes of land, and subject also to certain provisos. Exemption is claimed under the 4th proviso which declares that nothing in the section shall "authorize the assessment of any land which has been held revenue-free for sixty years continuously unless it is shown that the right so to hold it has ceased to exist." The learned Advocate-General argued that the words "held revenue-free" meant so held "as of right" but he was not prepared to argue that they could not mean merely "held without payment of revenue," apart from any question of the right so to hold the land. I think that if the former meaning had been intended it would have been expressed in definite terms, and that the meaning to be attached to the words is the alternative one suggested. The proviso then would seem intended to reproduce the rule of 60 years limitation provided by section 2 of Regulation II of 1805. It is also definitely enacted that the proviso is made inapplicable if it be shown in the case of land so held that the right so to hold it has ceased to exist. The qualification is probably intended to save the land revenue in cases where at some time the land has been rightly held without payment of revenue within the sixty years. The effect of the proviso appears to be to save the land from assessment if the owner can prove 60 years possession without payment of revenue, unless Government can prove that at sometime within the 60 years there was a cessation of the assessee's right to so hold it. If it were sufficient for Government to show that at any time, even before the 60 years, the owner had no right to hold the land revenue-free or had lost the right the practical effect of the proviso would be merely to raise a presumption in favour of freedom from assessment after 60 years holding without payment of revenue. If that had been the intention, I think it would have been expressed in simpler language. It seems to be a case of an exception within an exception, so that if in fact there has never been a right to

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hold the land revenue-free the second exception will not apply and the holding of the land without payment of revenue for 60 years will bar the assessment.

I must confess that I express this opinion as to the meaning of the 4th proviso with considerable diffidence in view of the fact that the 2nd proviso contemplates cases of assessment of land which was not included in the assets of an estate at the time of the Permanent Settlement, but I do not see what other construction can be placed upon it.

The learned District Judge favoured the view that the proviso to section 28 could not have retrospective effect, in other words that it could not come into operation till the year 1946. This view was only faintly supported in this Court and does not commend itself to me. There does not appear to be any parallel between this case and the case relied on by the learned Judge.

In the present case the appellant has held the land for more than 60 years without payment of rent, it is not shown that he lost the right within the 60 years preceding the suit, in fact, it is not shown that he ever had the right to hold revenue-free. The result is that the Regulation does not authorise assessment in his case.

I therefore agree in allowing the appeal and decreeing the plaintiff's suit.

A. N. R. C.

Appeal allowed.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.

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IAKURKA COAL COMPANY, LIMITED

v.

JAMNADASS BHAGWANDASS.*

January, 12, 13.
14, 17, 19, 20.
February, 11.

Contract—Construction—Principle on which a stipulation or undertaking is to be implied in a written contract.

* Appeal from Original Decree No. 49 of 1915, against the decree of Mr. Justice Chaudhuri, sitting on the Original Side, dated the 14th April, 1915.

The law recognises the fact that men assume that the words of the contract will be understood in their trade meanings, and that the terms of their agreements will be governed by the well-recognised usages of the callings to which they relate, and it necessarily looks to these usages to ascertain the real thought of the contract. It finds that merchants do not write all the terms of their contracts, but rely upon the knowledge and good faith of one another as to matters so well-known that special reference to them would be burdensome and unnecessary, and that they accordingly agree upon many of the terms of their contracts by mere silence; what these terms are, must be shown by parol evidence.

Appeal by the Defendant Company.

Suit for damages for breach of contract.

The material facts are stated in the judgment of Mr. Justice Chaudhuri, which is as follows :

Chaudhuri, J.—The plaintiffs purchased from the defendant Company 6000 tons of Lakurka B.B. Rubble Coal at Rs. 1-6 per ton and 4000 tons dust coal at Rs. 1-4 per ton; delivery was to have been from November 1911 to April 1912. The contract is evidenced by certain letters referred to in the plaint. The plaintiffs allege that although they were ready and willing to perform their part of the contract, the defendants failed to supply the coal, except a small quantity of the aggregate value of Rs. 2,726-7-3, particulars of which are set out in the fifth paragraph of the plaint and in the schedule annexed thereto. It is also alleged by them that the market rose considerably and the rate on the 30th April 1912 was Rs. 5-8 for B.B. Rubble and Rs. 5-4 for dust. They claim damages on the basis of the difference between the contract and the market rates. They also pray for the return of the deposit money amounting to Rs. 800 with interest thereon at $3\frac{1}{2}$ per cent. from the 28th October 1911 to the 27th January 1913 and a further sum of Rs. 489-7-9, being the excess of the amount paid by them to cover prices of coal which they had requisitioned, but which had not been supplied. There is no dispute that the quantity contracted for has not been delivered; neither is there any dispute that the market began to rise shortly after the date of the contract and continued to rise steadily up to April 1912, and in fact the parties have agreed that the market rate for both kinds of coal on the 30th April is to be taken at Rs. 4-14 per ton. It is not disputed that the two other sums claimed (I am not now dealing with the amount claimed for damages) are repayable to the plaintiffs. There is also no dispute that the contract quantity of B.B. Rubble, which is the commercial name for brick burning rubble, and dust, was not ready up to the 30th April 1912. The explanation given by the defendant

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Company is this : that steam coal and slack are first raised from the mine, slack being coal which goes through a one inch mesh : then the slack is screened and what passes through a quarter inch or a half inch mesh is called "rubble," and the rest is called "dust". The defendants say that the Colliery was full up with steam coal and slack which had been raised ; that the steam coal could not be sent away quickly enough and there was not room enough for the purpose of screening the slack to obtain the two kinds of coal contracted to be sold to the plaintiffs. The steam coal could not be sent away for shortage of waggon supply by the Railway Companies.

There is no dispute about the correspondence which passed between the parties. The plaintiffs received a letter on the 1st of May 1912 from the managing agents of the defendant Company putting an end to the contract in the following terms :

To

Messrs. Jamnadass, Bhagwandass,
Katrasgarh.

6000 tons Lakurka B. B. Rubble, 4000 tons Lakurka dust, 4000 tons Auckland B. B. Rubble.

Dear Sirs,

With reference to your above contract, we are prepared to continue delivery until their completion under the following conditions : We will deliver during the remainder of this season such quantities of dust and B. B. Rubble as there are waggons available for. Any quantities remaining not despatched to be carried forward for delivery next season, subject to waggon supplies. Kindly let us know if you agree to the above, otherwise the contract is *finished*.

Yours faithfully,

H. V. Low & Co.,

Managing Agents,

Auckland Coal Co. Ltd.,

Lakurka Co. Ltd.

The defence in the written statement is practically contained in two paragraphs ; paragraph 5, in which the defendant Company denies that the plaintiff firm was ready and willing to carry out their part of the agreement, and paragraph 7 which runs as follows : "The defendant Company submits that under the agreement aforesaid, it was the duty of the plaintiff firm to take delivery of the rubble and dust at the defendant Company's Lakurka Colliery and to remove the same from there. The defendant Company at

the request of the plaintiff firm endeavoured to procure from time to time Railway waggons to remove the rubble and dust contracted for by the plaintiff firm, but were unable to procure a sufficient number for the purpose, and, owing to the said insufficient supply of waggons and not to any default of the defendant Company, the plaintiff firm failed to take delivery of the rest of the rubble and dust".

So far as the question of the plaintiffs' readiness and willingness is concerned, I hold in their favour.

In fact learned Counsel, Mr. Langford James, who appeared with Mr. Das for the defendant Company, did not dispute that the plaintiffs were ready and willing ; he said that it was clear that the plaintiffs were anxious to get as much as possible and would have gladly taken whatever could have been given to them. That also is practically the evidence of Mr. Burt. He said he understood that the plaintiffs were ready to take as much as the defendant company could give.

Now the substance of the defence in the 7th paragraph of the written statement is this :

(1) That it was the duty of the plaintiff firm to take delivery at the colliery and to remove the coal from there. (2) That the defendant company endeavoured to procure waggons at the request of the plaintiff firm, but were unable to procure a sufficient number, and in consequence the contract quantity remained untaken.

There has been voluminous correspondence with regard to the dispute between the parties, but the defence above stated is not made in the correspondence, not even in the letter of the 1st of May, 1912. There was a further defence taken at the hearing which is not indicated in the written statement or in the correspondence, namely, that all orders from the plaintiffs had been complied with. This was based on the plaintiffs' letter of the 26th October 1911, and the reply thereto, which are set out in the plaint. The plaintiffs state in their letter that the collieries are to "effect prompt deliveries of the stuff against their requisition," and the defendant company in their reply say that they will hold themselves in readiness to deal with the plaintiffs' despatching instructions. At the time of settlement of issues, some considerable discussion took place, as will appear from the minutes. I desired after the matter had been fully discussed, in order to have a clear record of what the issues were, that they were to be put into writing signed by both sides and handed in, but unfortunately I find that has not been done. The Court minutes, however, show what the issues were.

I shall now deal with the question, namely, whether the orders given by the plaintiffs were complied with. The plaintiffs deny they

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were. Pursottumdass says, "verbal orders were always given—(the expression used by him was "Burrobar")—and that orders in writing were given from time to time." He gave certain instances in his examination-in-chief to show that verbal orders used to be given, that is to say, he gave instances of deliveries which, according to him, did not correspond with written orders, and he asked me to conclude therefrom that they were given according to verbal orders. Mr. Langford James in his cross-examination has succeeded in showing that in almost every single instance in the cases given by the plaintiffs, the deliveries were covered by written instructions. He was able to show that in the instances mentioned by the plaintiffs, the original orders had been altered, such orders were put off for some reason or other, and that eventually when the goods were sent, although there were no written orders or correspondence about the matter, they were really covered by the original orders of the plaintiff company. But I do not think there is any doubt whatever that verbal orders for delivery used to be given by the plaintiffs. Arindra Mohun Chaudhuri, the colliery clerk, admitted that in one or two instances verbal orders were given. He, however, said that after such verbal orders were given, the following day written orders were filled up. That verbal intimation or orders used to be given, is also supported by Mr. Burt, the manager. He said that he used to get despatching instructions in writing and also from verbal intimation from the Babu to indent. He is there referring to the colliery clerk who used to give verbal intimation, having collected information from persons requiring coal. The plaintiffs' case is to be found in the statement of Bisseswar Lall. He says he told Mr. Low, the managing agent, and the other partner, Mr. Pattinson, about the 15th of October, that the plaintiffs were prepared to take one hundred tons a day, and that Mr. Pattinson said he would complete the deliveries by April following. Unfortunately we have not got the evidence of Mr. Pattinson with regard to this matter. He left for England a month before the hearing of the suit. The plaintiff said, "I used to speak to the colliery manager, and he used to say it was not necessary for me to give him further orders as he was himself arranging for the supply of coal to us, that is to say, deliver the coal to us. I used to tell him I wanted him to give delivery of a large number of waggons and he used to say that he was arranging for waggons. He said it was no use giving him orders as I wanted, daily, and that he would give delivery, as he would be able to secure waggons; in fact he told me not to give written orders. I

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gave verbal orders. If he had waggons he would give, otherwise he would not take the orders. He said it was no use taking further orders then, and that he would take orders only to the extent of waggons available. He used to tell me when the waggons were available, then I would give written or verbal orders." Pursottum-dass, the other plaintiff, stated practically the same thing. His words were, "they used to say it was no use giving large orders as they could not be complied with, and therefore we had to suit them according to the waggons available." Mr. F. Burt, the manger of the company, said, "I know Brij Lal. He always came in the morning and used to ask me then how many waggons I could give, and then he gave orders. He left orders after I told him what I could give him, but not always. I had always in my mind that his contract was for 6000 tons. I did not tell Brij Lal that he need not give orders; that I would let him know and then I would take orders." It is admitted that the defendant company could not give the plaintiffs all they wanted. I have already referred to the evidence of Mr. Burt in which he said that he understood that they wanted as much as the defendant company could possibly supply. He also said that he endeavoured to give the plaintiffs as much as he possibly could. It seems clear to me on the correspondence that if the defendant company's case was that there was no duty cast upon them either to procure waggons, or that the plaintiffs were to take delivery of the coal from the colliery, it being their duty to remove the coal from there, why was no such case ever made in the correspondence. It seems clear to me, having regard to, amongst other things, the evidence of Mr. Burt, and also the correspondence, that the case that it was for the plaintiffs to take delivery of the coal by removing the coal from the colliery, is not sustainable. It is also clear from the evidence that the rate at which the plaintiffs purchased included cartage and cooly hire, namely, from the pit's mouth to the waggons at the defendant company's colliery siding of the railway; the siding, it is to be noticed, is the siding of the defendant company, which they have to erect at their own cost. It seems clear to me that it was perfectly well understood that the coal was to be raised, made ready and placed in waggons at the siding of the defendant company by the defendant company to be despatched by them according to the instructions of the plaintiffs. The question, therefore, arises as to whose duty it was to get the waggons. The contract is silent about the matter, but some indication is afforded by three letters, two from the plaintiffs dated

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respectively the 6th November 1911 and the 12th November 1911 to the managing agents of the defendant company, and the reply of the defendant company thereto dated the 27th. The letter of the plaintiff company of the 12th September asked the defendant company to arrange for regular supplies against their indents for waggons. The defendant company replied that they would hold themselves ready against the plaintiffs' despatching instructions. It is clear from the evidence that the railway companies do not accept indents for waggons except from Colliery managers or Colliery proprietors; that the manager of a colliery indents, having regard to his requirements. That, of course, includes requisitions from their managing agents and their local buyers. Burt said, that "the waggons were always indented for by the Colliery proprietors, and they undertook it usually unless the matter was otherwise contracted for;" that the manager distributed what he got equitably amongst the purchasers—that was the usual course of business. He added "I always endeavoured to give the plaintiffs as many as I possibly could according to instructions. I could not give them all they wanted. I understood they wanted as much as I could possibly give them. I fixed these contracts on the understanding that I was to get the waggons; upon indents being sent by the Colliery manager the railway company supplied the waggons." The supply is clearly in the hands of and under the control of the railway companies over which the colliery manager has no control. At the time of this contract no difficulty had arisen about the supply of waggons, but soon thereafter there was a shortage in the supply of waggons, and the question arises as to how it affects the contracting parties. Mr. Burt said that the colliery proprietors usually undertook "it," which I understand means to get the waggons, unless otherwise contracted for. I find from the evidence that even at that time, what are known as the Indian Mining Association Contracts, were in vogue, which contain a special stipulation about the supply of waggons by the railway companies. There is no special provision in this contract about waggons. I think it was well understood by both parties at the time of this contract that the defendant company was to get the waggons and the quantity sold to the plaintiffs between November 1911 and April 1912. It appears that having regard to the shortage, the railway companies were interviewed, and apparently promises were obtained from them by the managing agents of the defendant company that they would give as much as possible to the defendant company. It seems to me that if it was the defend-

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ant company's case that they were not at all liable in consequence of such shortage in the supply of waggons, that contingency not having been previously thought of, why did not the Colliery agents write at once to the plaintiff firm saying that they had not anticipated any shortage in the supply; and that therefore the matter ought to be re-arranged. There was no attempt on the part of the agents of the defendant company to get any settlement about this matter at that stage. They did not even say that they would not under the circumstances guarantee the delivery. They did not say that the matter not being under their control, their liability was at an end, and that future delivery would depend upon what the railway could supply. On the other hand there is a letter from them to the plaintiffs that the shortage of supply was only temporary, but that full supplies would be given from the end of the month, that is to say, from about the end of December 1911. The defendant company, however, suggest that the plaintiffs knew the state of things and accepted the position. If there was such an acceptance of the position, I do not find any indication of it in the correspondence which followed, and which continued for several months. I shall refer to only a few of the letters. The plaintiffs' letter of the 22nd November 1911 complains of not getting supplies against their requisitions for waggons; that they needed one hundred tons a day. Messrs. Low & Co., managing agents, replied on the 23rd that during December the shortage would continue, but from January they hoped to deal with the orders promptly. The plaintiffs again complained on the 12th December 1911, and the reply on the 13th is, "Manager instructed to despatch at once against your orders." The plaintiffs wrote on the 13th to the manager that the stuff was not ready, and would the manager see that the waggons were supplied against their indents. Brij Lal says that he told Mr. Burt that he was to get as many waggons as possible for him, and that Mr. Burt told him there was no necessity for orders beforehand; that he would give waggons as they came; that the plaintiffs thereupon gave the exact destination of the waggons, when told that they were available, as the destination could not be given before that. It is also clear from the correspondence that the plaintiffs never accepted the position that they could only get to the extent of the waggons available. The correspondence clearly shows that they held the defendant company bound to deliver the entire quantity by the end of April 1912. The brick burning season ends in March, sometimes in April. It appears that after information was received from the defendant

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company about the number of waggons which they could place at the disposal of the plaintiff firm, the plaintiff firm used to give instructions where to send them. Mr. Das appearing for the defendant company has shown that their requisition for waggons was not fully complied with by the railway company, in fact only a small proportion was sent. He said that dock orders for steam coal were necessarily given preference to for two reasons, (1) that in that way steam coal could be sent away, thus making room for screening rubble and dust; and (2) that dock orders were always considered urgent, and therefore had precedence. He submitted further that the plaintiffs had not been unfairly dealt with; that everything possible to help them was done by the defendant company and that the charges made by the plaintiffs that they had not been fairly dealt with were not sustainable. Upon the evidence I am not able to find that the defendant company wilfully neglected to supply the plaintiff company. They had large orders to deliver against. They requisitioned for waggons and did not get a sufficient supply, but they apparently did their best for all the parties concerned, having regard to the shortage. Mr. Das complained that in several instances the plaintiff company had diverted the original destination of the waggons and also cancelled some of their orders. So far as the cancellation is concerned, some were admittedly on the ground of delay in getting waggons. In respect of some others, I cannot find from the evidence why they were cancelled, but it is clear from the evidence of Arindra that the defendant company never complained against the plaintiffs for such diversions or cancellation. I find that having regard to the shortage of waggons, the defendant company tried its best to get as many as possible. They even adopted a device for that purpose, namely, they began requisitioning for docks only which they knew ensured early compliance—being always considered urgent. It was thus not necessary for them to consult their buyers about their wants, before they sent their requisitions for waggons. But the utmost that the defendant company could provide room for in their E. I. R. siding at that time, was 29 waggons. Mr. Dempster said they felt that having regard to the orders in hand, they should provide for another siding, but it was too late that season, as a new siding meant at least one year. Next year they built an additional siding and they had then room for 60 waggons. There is no doubt about the view the managing agents took of the situation. The plaintiffs wrote on the 14th January 1912, Exhibit A1—“You can easily imagine now as when we can accept the quantity

of delivery. The bills for November have not yet been received. Please expedite despatch of the same early. Thus the loss we are coming by through the contract with you, knows no bounds, but be sure all the loss suffered by us will be with you." The letter is not grammatical, but quite intelligible. They wanted "a plain reply." Mr. Dempster did not recollect having received such a letter but it was not denied that it was received. There is a letter from him on behalf of the managing agents, Exhibit A3, dated the 21st of February, in which he said that the buyers (namely the plaintiffs) had not been getting a fair supply of waggons, and if they brought a suit, the defendant company would undoubtedly lose. That, however, is a view of the law, and I do not want to hold the defendant company liable because Mr. Dempster took that view. Mr. Dempster has now changed his opinion and says that he wrote in that way, as he was not then fully aware of the facts; that he was in Calcutta and did not know the state of things in the colliery; that he wrote without considering the question of waggon supply or of the stock. I do not attach any importance to that opinion, although the plaintiffs have naturally relied upon it. What I cannot, however, understand is that even when the defendant company and their agents were thinking of a possible law suit against them, it never struck them to take the present defence, namely, that they were not liable to provide waggons; that it was the duty of the plaintiff firm to take delivery at the colliery and to remove the coal from there. Why did not they so put that case at that time, or at any subsequent time, until the written statement came to be filed. I can only say that it was an afterthought. The defendant company had always understood that they were liable and that they had undertaken to provide waggons for the plaintiffs. It was a well-understood term of the contract although not so expressed. They had, it is clear from their conduct, never disputed that it was their duty, and that their failure to supply the contract quantity was a breach of the contract. Mr. Das has successfully shown that there was not any inequitable distribution of the waggons received, but I do not think that that affects the case. Although it is clear that the defendant company wanted to get rid of their steam coal first in order to enable them to screen for dust and rubble, the plaintiffs had nothing to do with it. The defendant company had to supply a certain quantity to the plaintiffs. It was for them to get the stuff ready. The defendant company thought that they should meet dock orders first, but the plaintiffs had no concern therewith.

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Although certain orders were looked upon by the company as more urgent than others, yet the plaintiffs had their rights under their contract. Mr. Das has urged that if the plaintiffs did not give orders at the defendant company's request, the case might have a different aspect, probably it might give the plaintiffs just ground for complaint, but if the plaintiffs acceded to the request of the colliery manager and did not give any orders in consequence, then the matter was to be treated on a different basis; that if the manager informed the plaintiffs that there was a shortage in the supply of waggons and that he could not supply in consequence, and if thereupon the plaintiffs accepted that position and did not give orders, that was a different case altogether; or if the plaintiffs knew the state of things and did not give orders, it was their fault, and the defendants were not liable.

The defendant company did not at any time, prior to suit, set up the case which they are setting up now; they never denied their liability to the plaintiffs. Considering the whole of the circumstances of the case, I am constrained to hold against the defendants. The defendant company knew shortly after the date of the contract that they could not supply the quantity within the stipulated period, but they kept on writing to the plaintiffs they would supply; they never said that having regard to the circumstances they were under no obligation to do more than what they were doing. They never rescinded the contract. In their letter of the 1st of May they simply said the contract "was finished." I understand by that that they were not going to give any further delivery. It is quite clear that the plaintiffs had ready purchasers and that they could sell the whole of this quantity at a very large profit to themselves. They at once sold everything they could get. I think that their version of the matter, namely, that they used to go and enquire at the colliery and gave orders for despatch when waggons were placed at their disposal, is true. They never gave up their right under their contract—namely, that they were entitled to delivery of the entire quantity by April 1912.

I decree the suit for the plaintiffs.

The damages are to be calculated on the difference between Rs. 4-14 and the contract rate per ton, and the other items claimed in the plaint are allowed with costs on Scale No. 2. The costs of preparation of interrogatories will be allowed to the plaintiffs and the costs of and incidental to the notice to admit.

Against this judgment, the defendant company preferred an appeal.

Messrs. S. R. Das and Langford James for the Appellants.

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Messrs. B. C. Mitter, A. N. Chowdhury and A. Sinha for the Respondent.

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The judgments of the Court were as follows :

Sanderson, C. J.—This is an appeal by the Colliery Company from a judgment of Chaudhuri J. delivered on 14th April 1915 by which he gave judgment for the plaintiff for Rs. 29224-3-3 with interest. The claim was based on a contract whereby the plaintiffs agreed to purchase from the colliery company 6,000 tons of rubble at Rs. 1-6 and 4,000 tons of dust at Rs. 1-4 per ton, to be delivered from November 1911 to April 1912.

February, 11.

It is agreed that the contract quantity has not been delivered, and the defendants' contention was that the non-delivery was due to the failure of the supply of Railway wagons for the conveyance of the coal, for which the defendants allege they were not responsible.

It appeared that the only method of removing the coal from the colliery was by railway wagons from the colliery siding, that the Colliery had no wagons of their own available for the delivery of coal to their customers, but it was the practice for the colliery company in accordance with instructions from their customers to indent upon the railway company for the wagons, such indents were made for all their buyers according to despatching instructions and not separately for each buyer. The plaintiffs, in addition to other businesses carried on by them, were dealers in coal and had been in that trade for some 7 or 8 years at the date of the contract.

On the 6th September 1911, the plaintiffs wrote to H. V. Low & Coy., who are the managing agents in Calcutta for the colliery company, asking them to quote the actual selling rate for B. B. rubble from the Lakurka Company and stating that if the rate proved agreeable, they intended accepting the entire stock of B. B. rubble from the Lakurka Colliery. Apparently a rate was quoted, for on the 12th September 1911 the plaintiffs again wrote a letter to Low & Coy.—See letter (p. 11).

"We are prepared to accept your rate for Lakurka B. B. Rubble at Rs. 1-6 per ton as referred to in your letter of 11th September 1911 and beg to state that if you feel agreed to enter into a contract as to supplying us all the B. B. Rubble that is lying in your stock and will be raised till March 1912 and that no other men will be given supply of B. B. Rubble from your Lakurka

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colliery except ourselves and that regular supplies will be arranged against our indents for wagons, we are quite prepared to deposit amount to your satisfaction either at yours or at your office as you please. We beg to add that we shall commence taking delivery from October and with slow progress till December, but the last three months from January to March 1912, ours will be plenty orders to hand and those you are to please arrange to give prompt effect to.

"Also please let us know as to what will be the probable quantity including the B. B. Rubble lying in stock and that will be raised till March 12. Please oblige us by your kindly quoting the actual rate for dust from your Lakurka Colliery by return. A favourable reply will highly oblige.

"P. S. The deposit money must be the one as current in all other offices."

No answer was sent to this and accordingly the plaintiffs wrote again on the 16th September 1911, (page 12).

"We beg to invite your kind attention to our letter No. 412 of 12th September 1911 and shall feel glad to have an early reply thereto."

Then an interview took place on 15th October 1911 at the colliery at which Mr. Castles the colliery manager, Mr. Pattinson, a partner in Low & Coy. a Mr. Moore and two of the partners in the plaintiffs' firm were present, and an agreement was evidently arrived at between the parties, for on the same day a letter was sent from the Lakurka Colliery signed Low & Coy., to the following effect :—

"With reference to our conversation you may take delivery of 6000 tons of Rubble at Re. 1-6 (Rupee one and annas six) and 4000 tons of Dust at Re. 1-4 (Rupee one and annas four) per ton from November to April, cash with order and subject to a deposit of Rs. 1000 (Rupees one thousand) Government paper as security of due fulfilment of this contract."

On the 19th October the plaintiffs replied, (p. 13).

"With reference to your letter No. 948 of 15th October 1911 in connection with the purchase of B. B. Rubble and Dust from Lakurka and that of 15th instant regarding the purchase of B. B. Rubble from your Auckland Colliery, we beg to state that we agree to accept the quantities as offered by you in your above and that the money towards the security deposit shall be sent you after the Kali Puja Festival that takes place on the 21st next, as our Head Office at Ranigunge is also closed for the said period."

This was directed to Low & Coy., at Calcutta. Low & Coy., writing from Calcutta, replied on the 20th (p. 14).

"With reference to your letter dated 19th instant, we have no knowledge of a letter No. 948, dated 15th October 1911, nor of a letter regarding the sale of Auckland B. B. Rubble.

"We must see these letters and ascertain what quantities and rates were offered you before going further into the matter."

Obviously they had not been advised of the contract made at the colliery and evidenced by the letters of the 15th and 19th October 1911. Consequently the plaintiffs wrote on 26th (p. 14).

"With reference to your favour dated 20th instant, we beg to send you herewith copies of your letters Nos. 948 of 15th October 1911 regarding sale of 6000 tons of B. B. Rubble and 4000 tons of Dust from Lakurka Colliery at Re. 1-6 and Re. 1-4 per ton respectively and that dated 15th instant regarding disposal of 4000 tons of B. B. Rubble from your Auckland Colliery at Re. 1 per ton for ready references. To make it more plain we beg to remind you that the former letter was written out at 10 in the morning in the Lakurka Colliery Office while the latter at the Lakurka Colliery Manager's Bungalow at 4 p. m. in the evening. Further we beg to add that you did offer us abovementioned rates and we agreed to accept them.

"Herewith we beg to send you a Hundi valued Rs. 1,000 (Rupees one thousand only) on production of which at our Calcutta Office Lalchand Nupchand, 180, Harrison Road, the total value will be paid in, in exchange which please keep with you in deposit as security towards the proposed contract on the disposal of the B. B. Rubble and Dust. Please be good enough to acknowledge a formal receipt for the Hundi or the money you get in exchange with it at an early date and issue necessary instructions to your respective Collieries to effect prompt deliveries of stuff against our requisitions. Thanking you in anticipation," and, Low & Coy., replied on the 27th (p. 15)

"We are in receipt of your letter No. 883, dated 26th instant enclosing copies of our letter No. 948 and No. nil, dated 15th instant regarding the sales of 6000 tons of Lakurka B. B. Rubble coal, 4000 tons of Lakurka Dust coal and 4000 tons of Auckland B. B. Rubble coal to you at Rs. 1-6, Rs. 1-4 and Re. 1 per ton respectively, which are in order.

"On your Hundi amounting to Rs. 1000 security for the due fulfilment of the contract being cashed, our formal receipt will be

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handed to your Calcutta friends and we will hold ourselves in readiness to deal with your despatching instructions."

In my judgment, even if it had not been already made at the interview, the contract was concluded on the 19th by the letter which the plaintiffs sent accepting the terms offered by the defendants in their letter of the 15th, and this is the contract which the Court has to construe in this case.

It is alleged by the defendants that after the contract had been made and during the latter part of the month of November, a shortage of Railway wagons began to be felt, partly owing to the Durbar and partly owing to trade conditions, and that the Railway Companies did not supply sufficient wagons to the Colliery to enable the company to meet the requisitions of the company's customers and that consequently the deliveries of the quantities asked for by the plaintiffs could not be delivered. Assuming that there was such a shortage of wagons and that it was the cause of the non-delivery, the first question to be considered is whether the defendants can be held liable for such shortage of wagons. The learned Judge has held that it was part of the contract that the defendants should provide the wagons necessary for the delivery of the coal to the plaintiffs, and consequently that the defendants are liable for the failure to deliver. The contract as contained in the letters abovementioned has no reference to the supply of wagons, and it is not suggested that the arrangement made at the interview of the 15th October 1911 carried the matter any further.

If therefore there was an undertaking by the defendants to provide the wagons, it must be an implied undertaking.

The principle, on which a stipulation or undertaking is to be implied in a written contract, was laid down by Bowen, L. J. in *The Moorcock* (1), where he says "An implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy

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as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances." And, this principle was followed down by Lord Escher in *Hamlyn v. Wood* (1) and the passage to which I am about to refer is at page 491 where he says "A large number of cases have been cited, in some of which the Court implied a stipulation, and in others refused to do so. In my opinion, it is useless to cite such cases, so far as they merely shew that in the particular case an implication was or was not made. The only use of citing such cases is where they lay down the rule as to such implications, upon which the Court will act in dealing with the particular case before it. I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." Then he refers to the passage of Lord Justice Bowen which I have already quoted.

The question, therefore, is, can the Court in considering this contract in a reasonable and business manner come to the conclusion, that an implication necessarily arises that it was the intention of the parties that the defendants should undertake the absolute obligation to provide the wagons and be responsible for any failure of supply, even though they had taken all reasonable steps to procure them and the Railway Companies had failed to supply them.

It is admitted by the defendants that an undertaking to indent for the wagons and to load the coal into the wagons when supplied by the railway companies, must be implied. It was the regular practice and course of business for the customers to send their requisitions to the colliery and for the Colliery Company to indent for wagons in accordance therewith. It was indeed stated that as a matter of practice and course of business the Railway Companies

(1) (1891) 2 Q. B. 488 (491).

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only received indents from the colliery companies. Further the rate mentioned in the contract included charges for moving the rubble and dust from the colliery to the siding and loading it into the wagons: therefore it must necessarily be implied that there was a duty on the defendants to indent for wagons in accordance with the plaintiffs' requisitions and load them when supplied.

But I am unable to say that the further obligation mentioned above, viz., that the defendants would procure the wagons and would be responsible for any failure to supply, must necessarily be implied. In the first place the form of the contract is "you may take delivery of 6000 tons" etc, which would point to a taking of delivery in the ordinary way, viz., by delivering the coal into wagons at the colliery siding. So far as it goes, it would indicate a limitation of the defendants' liability to loading the coal into wagons when supplied. In the second place the Indian Mining Association form of contract, which I understand was the ordinary form of broker's contract in the coal trade, was put in evidence and this shows that such contracts are made "subject to supply of wagons for which the sellers shall indent on the railway company upon receipt of buyer's despatching instructions."

There was no evidence or suggestion that the rate mentioned in the contract was more than the market rate, and it seems to me strange that the defendants should without extra remuneration have taken upon themselves an obligation, not usually undertaken in such contracts, viz., an absolute liability to provide the wagons, over the supply of which they had no control except by way of indenting upon the railway companies.

To make such an implication would, in my judgment, be in the words of Bowen L. J., to impose on "one side all the perils of the transaction," or "to emancipate one side from all the chances of failure," and I cannot come to the conclusion that such a promise must have been in the contemplation of the parties.

This view of the case is borne out by the subsequent correspondence which was voluminous: it is clear that the plaintiffs were complaining of the non-delivery of the coal requisitioned by them, but an examination of the correspondence shows that they did not assert the absolute obligation of the defendants now relied upon until the attorney's letter of 8th May, 1912; but that when writing themselves, what they were insisting upon was that they were not receiving a proper proportion of the wagons which were in fact supplied by the railway companies.

On the other hand, when the complaint as to non-delivery was

first made, viz., by the plaintiffs' letter of 22nd November 1911, the defendants replied on the 23rd alleging the shortage of wagons as an excuse. If there had been the absolute obligation on the defendants now contended for, one might have expected the plaintiffs to have stated at once that the shortage was no excuse for non-delivery and that they should hold the defendants to their contract: on the contrary, by their letter of the 29th November 1911, they seem to accept the position that the defendants were excused from delivering as regards one Railway where there was a shortage, but allege that on another Railway, viz., the B. N. Railway, there was not the same excuse.

On the 30th November the defendants wrote :—

“ Dear Sirs,

“ We are in receipt of your letter dated 29th instant and regret the delay in executing your orders, but all buyers of coal are experiencing the same trouble and we are doing our best at the collieries to despatch what waggons are given us proportionately to our buyers.

“ We have written to the Colliery Managers both at Lakurka and Auckland, asking them to give special attention to your orders.”

To this proposition of proportional distribution there was no reply, and the plaintiffs did not rely upon the absolute right to have the wagons procured by the defendants for the delivery of their coal.

Again on the 15th and 16th January 1912 (p. 28) the defendants wrote :—

(15th January, 1912).

“ Dear Sirs,

“ In reply to your letter dated 12th instant we regret the delay in dealing with your orders, which is, as you know, due to small supplies of wagons. Mr. Burt is giving special attention to your orders and will reserve as many wagons for your requirements as he reasonably can.”

(16th January, 1912).

“ Dear Sirs,

“ We are in receipt of your letter of the 15th instant and have written strongly to the Colliery Manager regarding your requirements and trust you will have no further cause to complain of short supplies.”

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There was a reply to that letter on the 18th January by the plaintiffs, (p. 29) who wrote :—

"Dear Sirs,

(18-1-1912).

"We are glad to note the contents of your favour dated 16th instant and trust that henceforth we may have our orders to a certain extent complied with by Lakurka Colliery Manager but we would at the same time suggest of your kindly transferring some 4000 or 5000 tons B. B. rubble or Dust from Lakurka Colliery to your Govindpur Colliery where we learn slack coal is lying in abundance, or from any other collieries where you may feel convenient. In the event of your complying with the request, we are confident that we may have supplies of fair proportion of waggons. Awaiting a reply by return."

Then again on the 30th January the defendants wrote (p. 32).

"Dear Sirs,

"In reply to your letter dated 29th instant we have to say that you are receiving a proportionate number of the few wagons supplied to Colliery. Colliery Manager has been instructed to give your orders as much attention as possible. We have already replied to your letter dated 23rd instant. All cash and orders must be submitted to this office whence the orders will be passed on to Colliery for execution. Colliery has no authority to deal with orders."

Then on the 13th of February they wrote (p. 40).

"Dear Sirs,

"With reference to your letter No. 1881 dated 12th instant we beg to say that waggon supplies are now worse than ever they have been before. Ekra and South Gobindpur have been unable to supply any Rubble or Dust to you as practically no wagons for public orders have been supplied to them. Auckland is in a similar position. We are doing all we can under the circumstances and are doing our best to carry out your contract as far as circumstances permit, and your almost daily letters asking for supplies of waggons, which it ought to be clear to you we are unable to obtain. are quite unnecessary."

Then on the 21st of March they wrote (p. 46).

"Dear Sirs,

"We are in receipt of your letter No. 2,297 dated 20th March 1912 and are asking our Colliery Manager to increase deliveries to you.

"With regard to your claim, we do not admit liability. The

shortness of wagons has interfered not only with the supply of coal but with the whole work at the colliery. You have been at the colliery frequently of late and must have seen for yourself that there is no room to stack and no room to conduct screening operations. We are giving you a share of our wagons so far as the deplorable conditions at the Colliery will allow, and we must therefore ask you to give us time to complete the contract."

Then on the 3rd of April they wrote (p. 48).

"Dear Sirs,

"We are in receipt of your letter dated 2nd instant and in reply have to say that you are receiving a fair proportion of the waggons not required for Government orders. There are other buyers with running contracts with Colliery as well as yourself and you cannot expect to receive supplies to the complete exclusion of other customers."

There was no reply to this. The plaintiffs wrote on the 23rd April 1912 (p. 50).

"Dear Sirs,

"We beg to state that we are now quite tired of and disgusted with writing to you about increasing supplies but without any effect whatever. This month have we received supplies both from Auckland and Lakurka Collieries which are equally poor. This sort of supplies as has been continued for months together will not complete the contracted quantity, we shall, however, in reference to your letter dated 21st ultimo, be glad to extend the period up to 15th May 1912. Should you feel glad to arrange to complete our contract during the said period. But as we anticipate that you will still fail to act up to your promise as you have already done, we shall have to adopt measures for the same." To which the letter of the defendants on the 1st of May was an answer in these terms (p. 51).

"Dear Sirs,

"6000 tons Lakurka B. B. Rubble.

"4000 tons Dust.

"4000 tons Auckland B. B. Rubble.

"With reference to your above contracts we are prepared to continue delivery until their completion under the following conditions.

"We will deliver during the remainder of this season such quantities of Dust and B. B. Rubble as there are wagons available for. Any quantities remaining not despatched to be carried forward for delivery next season subject to wagon supplies.

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"Kindly let us know if you agree to the above, otherwise the contract is finished."

I have not referred to all the letters which were read many times in the course of the argument; to my mind the correspondence is inconsistent with the absolute obligation now contended for by the plaintiffs, viz., that the defendants were under a liability to procure the necessary wagons, though it is quite consistent with the case that the plaintiffs were entitled to a certain proportion of the wagons supplied by the Railway Companies, and shows that they were complaining that they were not receiving a proper proportion.

In my judgment, therefore, there was no absolute obligation upon the defendants to procure the wagons necessary for the delivery of the coal and dust to the plaintiffs; but that in this respect the defendants' liability was limited to indenting for the wagons and loading the coal when they were supplied by the Railway Company.

The question then arises whether there was such shortage of wagons as justified the defendants in delivering to the plaintiffs about 137½ tons of B. B. Rubble and about 770 tons of Dust coal during the specified time instead of 6,000 tons and 4,000 respectively.

I do not think there is any question that if the defendants had allocated all the wagons, which they received from the Railway Companies, to the plaintiffs, there would have been more than sufficient wagons for the delivery of the whole contract quantity; but on the other hand it is equally clear that if the Company's indents for the whole of their customers are taken into consideration, such indents were not fully complied with, and only a small proportion of wagons indented for was in fact sent, and the defendants contend that inasmuch as the known practice was for the colliery to indent for all its customers and not for any particular customer, the only obligation upon the defendants on the happening of the shortage was to distribute the wagons actually received among the buyers for whom the defendants had indented, and that in making such distribution not only must the orders of all the buyers be considered, but also the maintenance of the working of the Colliery; that there was no obligation to distribute the wagons on any standard of fairness unless such standard means taking into consideration not only the number of wagons ordered by the various buyers and the number supplied, but also the necessities of the Colliery and the course of business as regards the preferment of certain classes of orders.

It was further contended that the above-mentioned obligation did not arise out of the original contract of purchase and sale, but upon a contingency not contemplated by the parties and out of a contract of agency implied from the course of business and from their indenting for wagons.

I think, therefore, the case stands thus :—There was an obligation on the defendants to indent for wagons in accordance with the plaintiffs' requirements ; though the plaintiffs gave up making regular and specific requisitions for wagons in accordance with the request of the defendants, they clearly intimated that they wanted sufficient consignments to complete the delivery within the contract time ; the defendants did indent for sufficient wagons to complete the delivery, they did in fact get sufficient wagons, but such wagons were supplied in respect of indents sent by the defendants on behalf of other customers as well as the plaintiffs.

Under these circumstances, the plaintiffs allege that they are entitled to judgment ; on the other hand the defendants say that by reason of an implied agreement arising out of the course of business the defendants were only bound to give the plaintiff a proportion of the wagons actually received, and that they gave him such proportion.

This view of the case has not really been considered in the Court of first instance, for inasmuch as the learned Judge held that the defendants were under the absolute liability to provide the wagons, the last mentioned questions did not arise.

It is true, that the learned Judge has held that the defendants had "successfully shown that there was not any inequitable distribution of the wagons received", but this was, in view of his previous decision, "obiter dictum," and his finding on this point, has been challenged by the learned counsel for the plaintiffs.

I think, therefore, this appeal should be allowed and the case remitted to the Original Side for the above-mentioned matters to be tried : I am not certain whether any amendment of the pleadings will be necessary ; but in my judgment, if any amendment is necessary, leave should be given to allow the parties to raise the issues which arise in view of the construction which I have placed upon the contract.

I have purposely abstained from expressing any opinion as to the merits of any of the matters which will have to be investigated before the learned Judge of the Original Side, so as to avoid any charge of prejudice to the one side or the other ; but I wish to make it clear as far as my own judgment is concerned, that the only

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matter I have decided is the construction of the contract, and that all other matters, as for instance the allegation that the real cause of the delay was not shortage of wagons but shortage of coal and dust, are open to the plaintiffs, and that if the question of proportional distribution becomes material, the plaintiffs should not be precluded by the above-mentioned finding of the learned Judge in that respect, and that this matter also must be regarded as fully open to the plaintiffs. I think the appeal should be allowed with costs, and the costs of the first trial should be left to the discretion of the Judge who tries the case.

Woodroffe, J.—This appeal raises several questions of difficulty owing to the absence of a formal contract and the paucity of evidence regarding its making, the happening of a contingency for which no express provision was made, which provision must be made out from the course of business. It raises also a number of questions which it is not possible to here deal with as they have not been the subject of pleading, sufficiently specific issues and evidence and which have not been dealt with in the judgment which proceeds upon the single point of the construction of the contract. The suit is one for damages for breach of contract. It is for the plaintiff to establish both the contract and its breach. Negotiations open with an enquiry made in a letter of 6th September 1911. A reply was given by the colliery agents on the 11th September 1911 which is not produced and replied to by the letter of the plaintiffs of 12th September 1911 and 16th September 1911. Then on the 15th October according to the evidence of the plaintiff Purusuttamdas, a contract was entered into at the colliery with Mr. Pattinson a member of the firm of Messrs. Low & Co. the colliery agents. His evidence is that it was arranged that 6000 tons of rubble and 4000 tons of dust from the Lakurka Colliery would be supplied at Rs. 1-6 and 1-4 between November 1911 and April 1912. I quote the words of the witness. This oral conversation is said to have been confirmed by a letter written at the colliery dated 15th October 1911 which states "you may take delivery of 6000 tons etc." This letter was accepted by another of the 19th October 1911 written to the Calcutta firm who replied on the 20th October 1911 that they had no knowledge of the matter. On the 26th October 1911 it was explained to the latter that the contract was entered into at the colliery, to which Messrs. Low & Co. replied accepting the position and declaring that they held themselves in readiness to deal with despatching instructions. If the contract is to be found only in the oral evidence above

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referred to, and the letters dated 15th October 1911 and 19th October 1911, then according to the contract it would appear that delivery was to be at the defendants' colliery from which it was to be removed apparently by the plaintiffs, since nothing is said about the despatch of coal by the colliery. Such removal depended on the question whether railway wagons were available for the purpose. Nothing is said as to who was to get the wagons necessary or upon whom the loss would fall in the event of the Railway Company being unable to supply wagons. It is, however, common ground that the contract included terms to be gathered from the course of business. It is admitted that according to such course of business the Company was under an obligation to indent for the wagons—and if the wagons asked for were fully supplied, to assign them to the purchasers on whose behalf the indent was made, and then to load the wagons without further charge. The defence is that though not bound so to do by the express terms of the contract, yet by the course of business the colliery on behalf of the buyers indented for wagons and did not get the sufficient quantity with the result that the coal was not delivered. Two questions arise on this, viz., was there in fact a shortage of wagons, and if so, was the defendant Company liable therefor. That is, did such shortage to the extent it existed exonerate them. The case for the plaintiffs on the second point has been (and this has been accepted by the learned Judge) that the Colliery Company absolutely undertook to get the wagons and made themselves liable for the risk that wagons might not be available. In this view of the case it was not necessary for him to decide any other of the matters argued before us in appeal. I am unable to accept this view of the case for the following reasons. The express contract is silent on the point and no usage or course of business is established which fixes such a liability on the defendants. The argument in effect is an inference of such liability from other facts. The learned Judge finds that it was a well-understood term of the contract though not expressed. There is no oral evidence that it was so agreed and the contract as set out in the plaint is as stated in the letters there cited. The learned Judge however relies on the correspondence. The question of the absolute liability of the defendant Company to supply wagons was not there dealt with, but there is an admission there that the defendant Company was obliged to give the plaintiff a fair share of the wagons actually supplied and an apparent admission that the plaintiffs had not had such a share. Reliance has been placed on the fact that the defendant Company did not say that they had no

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liability whatever in respect of the wagons. But this question of the absolute liability of the defendant company to supply the wagons does not seem to have been present to the mind of the writers, and did not come up until they were written to by the attorney for the plaintiff. For on the other hand it may be asked why did not the plaintiffs in their earlier letters write and say that they were not concerned with the defendant company's difficulties about the wagons, for the latter was under an absolute obligation to supply wagons and were liable whether the railway company were able to supply the wagons or not. Nor does it seem likely that without extra remuneration the company would undertake to supply wagons. It is said that they made enquiries of the railway and were satisfied that there was no risk, the shortage being temporary only. A letter of the 17th October 1911 is relied on this point as also the defendants' oral evidence. It would appear from the letter of the 20th October 1911 that the writer of the former letter was unaware of this contract. The fact however that the supply of wagons may be taken into account in making contracts, does not establish an understanding by the company that they are liable for the wagon supply. Such enquiries are necessary for the carrying on of the business. Thus the company could not fairly at one and the same time assert its non-liability for wagon supply and allow others to contract with it without knowing whether such supply was sufficient to enable such others to get the benefit of such contracts. Further, we have it that at the time of this contract there was in existence a form of mining contract which was subject to the supply of wagons. It is said that the fact that it was not adopted in this case indicates an intention to contract without reference to any condition as to the existence of railway wagons. But this circumstance is explained by the fact that the contract was orally entered into at the colliery. Had it been entered into in Calcutta it is probable that the general mining contract would have been adopted. It is argued that because it is established that according to practice the colliery alone can indent for wagons, this shows that the obligation for supply is on the latter. This does not follow. What does follow in such a case is that there is an obligation on the colliery to indent. This however is admitted. But because the colliery is under the circumstances bound to indent, it does not follow in the absence of an express provision or proved course of business to that effect, that the colliery is to be held liable if on indenting it is unable to get wagons. The statement in the judgment that Mr. Burt fixed these contracts on the understanding that he was to get the wagons, is obviously ambiguous.

My conclusion then on this part of the case is that assuming (without deciding) that there was in fact a deficiency in the wagon supply, the defendant company is not liable on their contract in respect of such assumed deficiency. Thus if we had to deal only with a contract for delivery of 10000 tons of coal by the defendant to the plaintiff and there were no other contracts entered into by the defendant Company and wagons were supplied by the railway company sufficient to carry 5000 tons only, the defendant company would not in my view of the case be responsible for damages for non-delivery of these 5000 tons because a third party, the railway company, had not supplied the wagons necessary for the purpose. In short the contract was subject to wagon supply. The company have no wagons of their own.

But this finding does not dispose of the suit which is for damages for breach of contract and which the defendant company contests on the ground that they could not carry it out in its totality on account of deficiency in the number of wagons supplied by the railway. Its only effect is to negative the plaintiffs' contention that deficiency in wagon supply was no defence.

The question still remains for determination whether there was in fact a deficiency in supply of wagons which exonerates the defendant company from paying damages for goods admittedly not delivered, and if so, to what extent. It is admitted that between the 1st November and 30th April 1912, the number of wagons supplied to the company was 2300. The plaintiffs say it was more. It is not contested that about 600 wagons only were necessary for the carriage of the plaintiffs' coal. The plaintiffs on this contend that there was no shortage of wagons as alleged. If they are right in this, they are entitled to succeed notwithstanding that the first point here dealt with, viz., the construction of the contract, is decided against them. It being admitted that according to the course of business the company undertook and was bound to indent for and did intend for wagons and got wagons in excess of the requirements of the plaintiffs, it is upon the defendant company to show what they allege viz., that there was nevertheless a shortage of wagons which exonerated them from the carrying out of their contract with the plaintiffs further than they have done. It is true that Chaudhuri J. has held that there was a shortage and that the plaintiff received a fair proportion of the wagons available. But having regard to his finding as to the construction of the contract, this decision was not necessary, and doubtless for this cause was given without any statement of reasons and without consideration of points which have

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been argued before us in appeal, but do not seem to have been present to the mind of the learned Judge. Nor are the facts upon this issue as to the shortage of wagons sufficient for a decision, nor are such findings as are to be found in the judgment sufficient. What the standard of equitable distribution is, the learned Judge does not state. The case must therefore be remanded to the learned Judge for the determination of the issue, whether there was in fact a shortage in the wagon supply. If there was not, the plaintiff succeeds, if there was such a shortage it must be determined what the shortage was, and the extent to which it exonerated the defendant company from carrying out its contract. The first question to be considered on this issue is whether in ascertaining such shortage, it is open to the company to consider other contracts of other purchasers which have to be fulfilled, and if so, what contracts may be so taken into account. According to the respondents they are not concerned at all with the fact that the company entered into other contracts. This the appellants deny saying that as the indents for wagons were on behalf of all purchasers, they had to be distributed amongst the latter. The question further remains to be determined what contracts (if any) must be so considered, and in what way: and in particular whether contracts made subsequently to that of the plaintiff should not be excluded. For it may be argued that in entering into such subsequent contracts the defendant company to that extent precluded themselves from carrying out their contract with the plaintiffs. Whether this be a good contention has to be decided. Further on this point it must be considered whether the defendant company are entitled to give preferential treatment to loco coal, steam coal and slack. For they claim to be entitled to load the wagons first with steam coal and slack and to give to the plaintiff a share only of the wagons left over. Lastly after considering these and any other points which may arise on this issue, it will be necessary to determine whether the plaintiffs were entitled to a fair proportion of the wagons supplied, and if so, what was the fair proportion of wagons to which the plaintiffs were so entitled, and whether they did, in effect, get them, and if not, to what damages they are entitled in respect of coal which was not but which should have been delivered had the plaintiffs received the fair proportion of wagons to which they were entitled.

There is, in my opinion, no force in the contention that the defendant company are not liable because they in fact supplied the wagons for which they received despatching orders. For it is shown that the plaintiffs were told it was no use giving further orders

and that delivery would be given as and when wagons were available. There is, however, a further issue which has still to be tried, *viz.*, whether the contract quantity of B. B. Rubble was ready for delivery, and if not, whether and to what extent the shortage of railway wagons exonerates the defendant company.

It being decided by us that the defendant company is not liable for shortage of wagon supply, the suit must be remanded to the learned Judge to enquire and determine (1) whether there was in fact a shortage of wagons, and if so to what extent such shortage existed and operated to exonerate the defendant company; (2) whether the contract quantity of B. B. Rubble was ready for delivery.

In determining these issues it will be necessary to determine the respective contentions of the parties above noted, as also on the second issue the question whether the shortage of wagon supply, if any, affects the question of the *prima facie* liability of the defendant company in respect of non-readiness to deliver if this is established. That rubble was not ready for delivery seems hardly to have been disputed, but the bearing of this fact on the case and its relation to the question of wagon supply has not been considered.

As the hearing of the appeal has to a large extent been concerned with the question of the construction of the contract on which the respondent fails, the appellant is entitled to the costs of the appeal. The case must be remanded for determination of the other issues which arise in the suit. The costs of the suit will be dealt with by the learned Judge after the determination of the remaining issues on remand.

Mookerjee, J.—This is an appeal by the defendant company against the plaintiff firm in a suit for damages for breach of contract. The case for the respondents is that the appellants agreed to supply 6000 tons of B. B. Rubble coal and 4000 tons of Dust coal during the months of November, 1911 to April, 1912; that the company actually applied only 1372 tons 13 cwt. of the former kind and 771 tons 5 cwt. of the latter kind; and that the plaintiffs are consequently entitled to recover Rs. 33,727-4-9 as damages for breach of contract. The defendant company, in their written statement, submitted that though at the request of the plaintiff firm, wagons were indented for from the Railway Company, the latter could not supply a sufficient number of wagons, and, consequently, the coal could not be delivered in terms of the agreement. The written statement, in fact, suggested that it was the duty of the plaintiff firm to take delivery of the Rubble and Dust at the colliery and to

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remove the same from there, and that owing to insufficient supply of wagons and not to any default of the company, the plaintiff firm failed to take delivery of the rest of the rubble and dust coal. On these pleadings, the question obviously arose, whose duty it was to get the wagons. Mr. Justice Chaudhuri has come to the conclusion that the colliery company had undertaken to provide wagons, and that the failure of the company to supply the contract quantity was a breach of the contract; in this view, the plaintiff firm have been awarded a decree for Rs. 29,224-3-3. The defendant company have appealed to this Court, and the cases of the respective litigants have been elaborately presented from every conceivable point of view, by Mr. Das for the appellants and Mr. Mitter for the respondents. The fundamental question for determination, as it has emerged out of this discussion, is, was there any, and, if any, what, agreement between the parties as to the supply of wagons in which the coal was to be loaded for transmission.

The contract between the parties is embodied in two letters dated the 15th and 19th October, 1911. The first of these letters had been preceded by oral negotiation, which, admittedly, does not affect the question now in controversy. The letter itself is addressed to the plaintiff firm and states 'you may take delivery' of the stated quantity of coal, at certain rates per ton from November to April. The second letter, which is addressed by the plaintiff firm to the Calcutta agents of the defendant company, contains the acceptance of the terms offered in the earlier letter. It is thus plain that these letters are entirely silent as to the wagon supply; they do not explicitly state whose duty it was to get the wagons; this is subject to the observation that the language used in the first letter, if literally interpreted, may apparently support the theory that, as the purchasers were to take delivery, they were to provide the wagons in which the coal was to be loaded. In a case of this description, one of two hypotheses is possible—either that this particular point had entirely escaped the attention of the parties, or that the contract, though contained in several writings, is imperfectly expressed, and was made subject to a usage or custom of the trade or to the course of business usual in the class of transactions to which the contract relates. The voluminous evidence on the record shows that, in the case before us, the contract, in truth, is partly express and in writing, partly implied or understood and unwritten. The test to be applied to discover the entire contract, in their circumstances, is that formulated by Sir John Coleridge in *Juggomohun v. Manickchund* (1),

namely, is the usage so well-known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract. To the same effect is the language used by Willes J. in *Plaice v. Allcock* (1), "it must be shown as a matter of law, first, that it was a certain usage; and, secondly, that it was a reasonable usage, not inconsistent with law, and as a matter of evidence, that it was so universally acquiesced in that everybody in the trade knew it, or could have ascertained it if he had taken the pains to enquire." Lord Alverstone, C. J. in *Devonald v. Rosser* (2) refers with approval to the similar words used by Lord Denman C. J. in *R. v. Stoke-upon-Trent* (3): "it is so universal that no workman could be supposed to have entered into the service without looking to it as part of the contract." As was said by Bowen, L. J. in *The Moor Cock* (4), and by Lord Esher, M. R. in *Hamlyn v. Wood* (5), the Court has a right to imply a stipulation in a written contract, only if on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. The same view was in substance adopted by Ayyar, J. in *Volkart v. Vettivelu* (6), when he said that the usage deemed incorporated by implication into a contract must be shown to be certain and reasonable and so universally acquiesced in that everybody in the particular trade knows it or might know it, if he took the pains to enquire. Reference may also be made in this connection to *Pradyote Kumar v. Gopi Krishna* (7), [where reliance is placed upon the observations of Baron Parke in *Hulton v. Warren* (8), and *Gibson v. Small* (9)], and to the notes to *Vigglesworth v. Dallison* (10). The truth is that the law recognises the fact that men assume that the words of the contract will be understood in their trade meanings, and that the terms of their agreements will be governed by the well-recognised usages of the callings to which they relate, and it necessarily looks to these usages to ascertain the real thought of the contract. It finds that merchants do not write all the terms of their contracts, but rely upon the knowledge and good faith of one another as to matters so well-known that special

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(1) (1866) 4 F. & F. 1074.

(2) (1906) 2 K. B. 728 (741).

(3) (1843) 5 Q. B. 303.

(4) (1889) 14 P. D. 64.

(5) (1891) 2 Q. B. 488.

(6) (1887) L. L. R. 11 Mad. 459.

(7) (1910) L. L. R. 37 Calc. 322; 11 C. L. J. 209.

(8) (1836) 1 M. & W. 466

(9) (1853) 4 H. L. C. 353 (397).

(10) (1779) 1 Sm. L. C. (1915) 613; 1 Douglas 207.

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reference to them would be burdensome and unnecessary, and that they accordingly agree upon many of the terms of their contracts by mere silence ; what these terms are, must be shown by parol evidence. See *Browne v. Byrne* (1) ; *Humphrey v. Dale* (2). We must, consequently, determine, upon the evidence, what term was by implication included in the contract between the parties to this litigation ; in this connection, it is important to observe that the parties are now agreed that there was an implied term as to the supply of wagons.

In the Court below, as already indicated, the defendant company alleged that the plaintiff firm were under an obligation to take delivery of the rubble and dust at the colliery and to remove the same from there ; in other words, it was the duty of the plaintiff firm to secure a sufficient number of wagons, though the defendant company, at the request of the plaintiff firm, endeavoured from time to time, to procure the wagons. The plaintiff firm, on the other hand, maintained that the defendant company were under an absolute obligation to provide the necessary wagons and that the alleged shortage of wagons afforded no valid defence to the claim. In my opinion, neither of these extreme positions is tenable. It is not disputed that the only method of removal of the coal was by means of railway wagons from the colliery siding. Neither the colliery nor the purchasers had wagons, and, *prima facie*, it does not look probable that either party should have undertaken an absolute obligation to provide the wagons ; there is, further, the important circumstance that even if either party had undertaken to supply the wagons, the railway company could not be forced to accept them for carriage of coal. Consequently, if either party had undertaken to provide the wagons, one would have expected to find evidence of negotiations with the railway authorities for the acceptance of the wagons so supplied ; apparently no such negotiation took place ; on the other hand, the defendant company enquired of the railway authorities whether wagons would be available. This serves to indicate that the parties looked forward to the railway company as the source of supply of the requisite wagons. This is fully borne out by such evidence, as we have on the record, of the usual course of business in transactions of this character. The evidence shows that the railway companies do not, as a rule, entertain applications from individual buyers for the supply of wagons for the carriage of coal, and that the indents for wagons are sent by the colliery companies. The evidence further

(1) (1854) 3 E. & B. 703 (715).

(2) (1857) 7 E. & B. 266.

shows that such indents are sent by the colliery companies, not specifically for individual buyers, but in accordance with despatching instructions received from various customers. In the case before us, the defendant company did, from time to time, indent for wagons, but never received the full supply, as the railway companies were unable to respond to the demand made on their resources by the Imperial Durbar and the trade condition consequent thereon. The defendant company maintain that when they indented for wagons, they did what they had undertaken to do in conformity with the usual course of business, and that there was no absolute obligation on their part actually to supply wagons. This contention has been negatived by Mr. Justice Chaudhuri; after careful consideration of the evidence, I regret I am unable to accept as sound his conclusion that the colliery company undertook an absolute obligation to supply the wagons into which the coal was to be loaded. This view I take is confirmed by various circumstances. The price agreed upon was the ordinary market rate, and no extra allowance was made by the company, as would undoubtedly have been made, if the risk had been undertaken by them. It is also clear from the Mining Association form that ordinarily the supply of coal from a colliery is made contingent upon the railway authorities supplying wagons indented for by the colliery upon receipt of despatching instructions from buyers. There would have been no controversy between the parties if the standard form of agreement had been used in this case; that they did not use it, does not imply that they intended to depart from the usual terms; if such had been their intention, one would have expected an express statement to that effect. On the other hand, the fact that the agreement was made at the colliery, far away from Calcutta, furnishes an obvious reason why the form was not used. We have also the very significant circumstance that in the course of the protracted correspondence between the parties themselves, no suggestion was ever made by the buyers that the sellers were under an absolute obligation to supply the wagons. Thus, to take the group of three letters dated 22nd, 23rd and 29th November, 1911, we find that the buyers complain of insufficient supply of coal, the sellers attribute the fact to heavy shortage of wagons, and the buyers in reply do not repudiate the excuse offered as irrelevant. In fact, the correspondence shows that the buyers throughout accepted the position, that, if there was in reality a shortage of wagons, the colliery company was under an obligation only to allocate a fair share or proportionate share of available wagons for their use; and

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the grievance they made was that they were not given such proportionate share. It was not till the matter had been placed by the buyers in the hands of their solicitors, that, on the 8th May, 1912, the position was taken up that shortness of wagon-supply was no excuse. Clearly, in a matter of this description, the conduct of the parties themselves affords valuable evidence of what they really intended by the agreement they had made. I hold, accordingly, that the view which commended itself to Mr. Justice Chaudhuri cannot be supported, and that the colliery company did not impliedly undertake an absolute obligation to supply the wagons. The implied term of the agreement, on the other hand, was that the colliery company would load the contract quantity of coal into wagons if the requisite number was supplied by the railway authorities on indents made by them, and that, in the event of short supply of wagons, the Colliery Company would allocate for the use of the plaintiffs a fair or proportionate share of the wagons available. The position, then, is that the fundamental ground which forms the basis of the decision of Mr. Justice Chaudhuri fails; the result follows that the appeal must be allowed and the case remitted for re-trial.

I do not think it desirable to enumerate exhaustively the points which may require investigation at the re-trial; but, some aspects of the case, which were sought to be developed in more or less detail in the course of the argument addressed to us, though possibly imperfectly appreciated in the trial Court, may be here indicated. One of the points for enquiry will obviously be, whether there was, as a matter of fact, a shortage of wagons, and if so, its extent; the question thus stated, has a deceptive appearance of simplicity, though it is really of a complex character. The buyers allege that while about 600 wagons would have been sufficient for the purposes of their contract, the colliery company had at their disposal 2300 wagons. This, *prima facie*, throws upon the company the burden of proof that they were not under an obligation to use, for the benefit of the plaintiffs, all the wagons available, and that they were entitled to take into account the claims of other customers and not only to give equal treatment to some, but preferential treatment to others. This aspect of the matter plainly requires careful scrutiny. The buyers also assert that apart from the question of short delivery of wagons, the colliery company had not ready the necessary stock of coal and that as a matter of fact they had no room either to conduct screening operations or to stock the coal. If this question is answered in favour of the company, and if they also prove that there

was a shortage of wagons due to circumstances beyond their control, the question will arise, whether the company did, in fact, allocate for the use of the plaintiffs a fair or proportionate supply of the available wagons; the proof of the affirmative of the allegation that they did so, clearly rests upon them. These and other questions, which it is neither possible nor desirable to specify precisely and exhaustively at this stage, will form the subject of investigation on the re-trial. I am also of opinion that liberty should be reserved to the parties to amend the pleadings and to re-adjust the issues.

On these grounds, I agree that the appeal must succeed and the case remitted for re-trial. The appellants are entitled to their costs here; the costs of the first trial will be in the discretion of the trial Judge.

Messrs. Morgan & Co. : Attorneys for the Appellants.

Mr. Debi Prasad Khaitan : Attorney for the Respondent.

A. T. M.

Appeal allowed : Case remanded.

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Before Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

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v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Suit for recovery of price with compensation—Goods sent for conveyance—Goods not reaching the consignee—Notice to Secretary of State, if valid—Collector, if a proper person to receive notice—Indian Railways Act (IX of 1890), Secs. 77, 140—Limitation Act (IX of 1908), Sch. I. Arts. 30, 31, 115.

A notice served upon the Government through the Collector within 6 months of the delivery of goods for carriage by the Railway, is sufficient to satisfy the requirements of section 77 of the Indian Railways Act.

Section 140 of the Indian Railways Act does not mean that the manager is the only person on whom notice can be served, but that if notice is served on the manager, the only alternative being service on the Government, it must be served on him in the manner provided.

A suit for the recovery of the price with compensation of goods consigned for conveyance to the Railway, which did not reach the consignee, is not governed by Art. 30 but either by Art. 31 or by Art. 115, Sch. I of the Limitation Act.

Per D. Chatterjee J. : Such a suit is governed by Art. 115, Sch. I of the Limitation Act.

* Civil Rule No. 1210 of 1915, against the decree of R. C. Sen, Esq., Small Cause Court Judge at Dacca, dated the 5th October, 1915.

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Mohansingh v. Conder (1) referred to.

Per Beachcroft J. : Quare : Whether the Collector is a proper person to receive notice under section 77 of the Indian Railways Act on behalf of Government, when notice is served on the Government and not on the manager.

Application by the Plaintiffs.

Application for revision under S. 25 of the Provincial Small Cause Courts Act.

The material facts and arguments are stated in the judgment of Mr. Justice D. Chatterjee.

Dr. Sarat Chandra Basak and *Babu Hemendra Kumar Das* for the Petitioners.

Babu Ram Charan Mitra for the Opposite Party.

C. A. V.

The judgments of the Court were as follows :

April, 11.

D. Chatterjee, J.—The petitioners on the 23rd of March 1914 consigned two bundles of cotton thread at the Dacca station of the Eastern Bengal State Railway for conveyance to one Gobindo at Narsinghdih. The goods did not reach the consignee and information was given to the District Traffic Superintendent on the 25th of May 1914. On the 5th of June 1914 they gave notice to the Traffic Manager of the Railway at Sealdah that if they did not get delivery within a week they would bring a suit. The petitioners say they gave this notice in accordance with the following rule printed and published in the Fare and Time Table of the Eastern Bengal State Railways. "References regarding delay in transit to or loss of goods parcels luggage or other articles and claims for compensation and refunds should be addressed to the Traffic Manager Calcutta." They also say that the said Railway has no officer who is called the manager but there is one called the agent. On the 1st August 1914 they served a notice on the Secretary of State through the Collector of Dacca demanding payment of compensation and informing him that in default of payment a suit would be brought after two months. This notice was it seems sent over by the Collector to the Traffic Manager who wrote to the petitioners asking for details of their loss and such details were duly supplied on the 4th of October 1914. On the 23rd December 1914 and 8th January 1915 the Traffic Manager wrote to them that the matter was under enquiry. The petitioners brought a suit for the recovery of the price with compensation. The defendant the Secretary of State pleaded (1) that the suit was not maintainable as no notice

(1) (1883) I. L. R., 7 Bom. 478.

had been given to the agent of the railway under section 77 of the Railways Act : (2) that the suit was barred by Arts. 30 and 31 of the 1st Schedule to the Limitation Act : (3) that no goods were in reality consigned by the plaintiffs who brought the suit in collusion with the servants of the railway.

The learned Judge in the Court below held that the goods had been really consigned but must have gone astray at Dacca instead of being loaded in the proper wagon, but as no notice had been served on the agent within 6 months he dismissed the suit with costs.

The petitioners obtained this Rule from this Court and it is urged at the hearing that the learned Judge was wrong in his decision on the question of notice.

Section 77 of the Railways Act provides that notice must be given to the railway administration within 6 months of the delivery of the goods for carriage by the railway. Section 3 (6) says that "Railway administration" in the case of a railway administered by Government, means the manager of the railway and includes the Government and in the case of a railway administered by a railway company means the railway company. Section 140 provides that any notice required to be served on a railway administration may be served in the case of a railway administered by the Government, on the manager and in the case of a railway administered by a railway company on the agent of the company in India.

It is contended by the learned vakil for the petitioners that the service of the notice dated the 1st of August 1914 on the Secretary of State through the Collector of Dacca was sufficient to meet the requirements of section 77: the learned vakil for the Secretary of State contends that section 140 is imperative and no notice but on the manager is acceptable. I think section 140 has not the effect of cutting down the connotation of the words railway administration as contained in section 3(6). It only provides for the convenience of the party aggrieved that if he wants to serve the notice on the manager of the State Railway or the agent of the railway company he must do so in one of the ways mentioned there. If the party chooses to give notice to the Government or the Native State or the Railway Company there is nothing in the Act to prevent his doing so; the latter alternative may enhance his trouble but it cannot take away his rights. I think the clause "includes the Government" has the effect of extending the meaning of the words railway administration which is the said words might not mean the Government when there was a manager. A number of cases have

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been relied on in this connection by either side but I do not think that any of those cases contra indicates the above view. The case of *The Secretary of State v. Dipchand Poddar* (1) is however the only case which had reference to a State Railway. The notice to the Collector there was beyond six months from date of delivery and therefore of no avail: the other notice was to the Traffic Superintendent within 6 months and the case was sent back for a finding whether it reached the manager within the required time. This case if it helps any side seems to help the petitioners for it was held in effect that it was not necessary to serve notice both on the Collector and the manager; for if it were the opinion of the Court that the Railway administration meant both the manager and the Government and notices were required to be given to both, the case would have been disposed of at once as the notice on the Collector was out of time.

All the other cases referred to in the argument are Railway Company cases and have hardly any bearing on the point at issue before us. Some of them however do indicate the opinions of the learned Judges who decided them on the point and may be referred to in this connection. The case of *The Great Indian Peninsular Railway Company v. Chandra Bai* (2) held that a notice to the General Traffic Manager was not a notice to the agent and was therefore insufficient. The learned Judges however say in one part of their judgment "the notification of a claim prescribed by section 77 may therefore be given either to the Railway administration as defined in section 3 (6) or in any other way". In the case of *Janaki Dass v. The Bengal Nagpur Railway Company Ltd.* (3), it was held that a notice to the Goods Superintendent is not a valid notice under sections 77 and 140. Sir Lawrence Jenkins C. J., says in his judgment however "the method of service permitted by this section (140) has not been followed nor has it been shewn that the claim has been otherwise preferred to the Railway Administration so as to satisfy the requirements of section 77". The Madras High Court also expressed a similar opinion in the case of *Perianna Chetti v. South Indian Railway Company* (4). The learned Judges say "we do not think that section 140 precludes a claimant from showing that the notice required by section 77 did in fact reach the agent within the time limited though not in one of the modes prescribed by section 140". This view is in accordance with what

(1) (1896) I. L. R. 24 Calc. 306. (2) (1906) I. L. R. 28 All. 552.

(3) (1912) 15 C. L. J. 211; 16 C. W. N. 356.

(4) (1898) I. L. R. 22 Mad. 137.

was held in this Court in the case of *The Secretary of State v. Dipchand Poddar* (1). I am aware of a note of dissent from the Madras case expressed in the case of *Nadiar Chand Shaha v. Wood* (2), but that case must be read by the light of its own facts and besides the authorities quoted do not seem to support the opinion which was expressed in terms rather too general. Furthermore that was a company case and the point now before us was foreign to the enquiry. I think therefore that these cases do not support the contention of the opposite party and the notice that was served in this case upon the Government through the Collector within 6 months was sufficient to satisfy the requirements of section 77. In this view of the case it is not necessary to consider whether the notice to the Traffic Manager was a valid notice. I think it right to state however that the position taken by the learned Government pleader in this respect also is very debatable. He says the notice ought to have been to the manager of the railway but there is no officer having that designation on this railway : then he says the notice ought to have been served on the agent but the law does not require notice to be given to the agent in a State Railway and if a notice had actually been given to the agent it could have been argued that it should have been given to the manager ; then again there is no evidence that the agent is the manager or that the Traffic Manager is not the manager.

On the other hand the Time and Fare Table of the railway which is presumably issued by the authority of the railway Administration directs the public to give notices to the Traffic Manager. I think that it is the duty of the Government to throw more light on this point and inform the public that the manager of the railway for the purpose of serving notices is either the Traffic Manager or the agent or somebody else.

The next question is that of limitation under article 30 or 31 of the 1st schedule to the Limitation Act. The goods were delivered to the railway on the 23rd of March, 1914 and the suit was brought on the 22nd of April 1915 about a month over one year after. Article 30 does not apply as the plaintiff's case was not for the loss of the goods and the defendant did not plead or prove any loss : On the other hand the defendant pleaded that no goods had been delivered at all. Article 31 applies to suits against a carrier for compensation for non-delivery of or delay in delivering goods and the time for suit is one year from the time when the goods ought to be delivered. I think this article also has

(1) (1896) I. L. R. 24 Calc. 306.

(2) (1907) I. L. R. 35 Calc. 194.

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no application. In the first place this article seems to contemplate a suit by the party who is entitled to the delivery namely, the consignee. In the second place it would be for the company to show when the goods ought to have been delivered—that fact being presumably within its knowledge but there is no evidence on the point : on the contrary the case of the defendant being that no goods were in reality delivered, he could hardly prove when the goods should have been delivered. Narsingdih is not a place on the same line but has to be reached after transshipment at Naraingunge so that one cannot even by guess say that the goods should have reached within a month. Apart from these considerations however I think that this is a case of a breach of a written contract and article 115 of the schedule governs the case. It was so held in a similar case *Mohansingh Chawan v. Conder* (1) which was followed by Garth, C. J and Wilson, J. in the case of *Danmull v. British India Steam Navigation Company* (2). This being so the suit was not barred by limitation. The learned Judge says he would have decreed the suit for Rs. 392-15 annas only if it were maintainable ; I would therefore decree the suit for Rs. 392-15 annas with costs. The petitioners are entitled to their costs in this Court 3 gold mohurs. The Rule is accordingly made absolute.

Beachcroft, J.—I agree that in view of the definition of the words "Railway Administration" in section 3 (6) of the Act, the notice under section 77 is effective if served on the Government, and that section 140 does not mean that the manager is the only person on whom notice can be served, but that if notice is served on the manager, the only alternative being service on the Government, it must be served on him in the manner provided.

Whether the Collector is the proper person to receive notice under section 77 on behalf of Government when notice is served on Government and not on the manager, I express no opinion, but as the learned Government pleader did not suggest that he was not, except in so far as he argued that under section 140 notice must be served on the manager alone, for the purposes of this Rule I accept the position that notice to the Collector is notice to the Government. As regards the question of limitation it is sufficient to say that I agree that article 30 does not apply, and that if article 31 does there is no evidence when the goods ought to have been delivered.

I agree in decreeing the suit.

A. T. M.

Rule made absolute : Suit decreed.

(1) (1883) I. L. K. 7 Bom. 478.

(2) (1886) I. L. R. 12 Calc. 477.

APPELLATE CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Richardson.*

MONMOHON ROY

v.

HEMANTA KUMAR MOOKERJEE.*

CIVIL.

1915.

July, 26.

Appeal—Provincial Insolvency Act (III of 1907), Secs. 43, Sub-sec. (2), 46 Sub-secs. (2) and (3)—Receiver—Court, if can authorise receiver to ascertain facts and report.

Under sub-section (2) of section 46 of the Provincial Insolvency Act, an appeal lies against an order under sub-section (2) of section 43 for imprisonment of the insolvent but not against an interlocutory order calling upon the insolvent to show cause why an order should not be made against him under sub-section (3) of section 43.

Quare : Whether the High Court can give leave to appeal against such order under sub-section (3) of section 46.

The receiver is an officer of the Court and when he has good grounds to believe that an enquiry should be made into the conduct of the insolvent, the Court can authorise him to ascertain the facts and to report them to it, with a view to the adoption of such steps as may be deemed necessary in the interests of justice.

Appeal by the Insolvent.

Some of the creditors reported to the receiver that the insolvent had fraudulently concealed property at his residence. The receiver obtained the permission of the Court to pay a surprise visit. The insolvent declined to admit the receiver into the house. This was reported to the Court, and the Judge thereupon made an order on the insolvent to show cause why an order should not be made against him under sub-section (3) of section 43 of the Provincial Insolvency Act. Against this order the insolvent with the leave of High Court, preferred this appeal.

Babus Satis Chunder Ghose and Bhupendra Chandra Guha for the Appellant.

Babus Joges Chunder Roy and Hem Chunder Mojumdar for the Respondent.

The judgment of the Court was delivered by

Mookerjee, J.—This appeal is directed against an order calling upon the appellant, who has already been adjudicated an insolvent, to show cause why an order should not be made against him under sub-section (2) of Sec. 43 of the Provincial Insolvency Act. That section authorises the Court to sentence an insolvent to simple im-

July, 26.

* Appeal from Order No. 274 of 1915, against the orders of Mr. Saroda Prosad Baksj, District Judge of Faridpore, dated the 22nd and 26th May, 1915.

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prisonment for a term which may extend to one year, when it is established that he has fraudulently concealed property. In this case, some of the creditors reported to the receiver that the insolvent had fraudulently concealed property at his residence. The receiver obtained the permission of the Court to pay a surprise visit. But the visit was of no use, because, although the insolvent was shown the order of the Court, he closed the doors and declined to admit the receiver into the house. This was reported to the Court, and the Judge thereupon made an order on the insolvent to show cause in the terms stated. This order is clearly not appealable under sub-section 2 of sec. 46 of the Provincial Insolvency Act, which allows an appeal against an order, under sub-section 2 of section 43, for imprisonment of the insolvent, and has no reference to an interlocutory order of the description now before us. The appellant, however, obtained leave of this Court under sub-section 3 of section 46 to prefer this appeal. Whether sub-section 3 of section 46 was even intended to be applied to a case of this description may be a matter for controversy; but it is plain that there are no merits whatsoever in the appeal. The insolvent has merely been called upon to show cause why an order should not be made against him under sub-section 3 of section 43; that does not in any way prejudice his position. But on his behalf, it has been argued, *first*, that the Court should not have authorised the receiver to pay a surprise visit, and, *secondly*, that the Court had no material for any order. These contentions are groundless. The receiver is an officer of the Court and when he had good grounds to believe that an enquiry should be made into the conduct of the insolvent, the Court could authorise him to ascertain the facts and to report them to the Court, with a view to the adoption of such steps as might be deemed necessary in the interests of justice. Thus, if we assume that the appeal is competent, it is clearly groundless, and must be dismissed with costs, three gold mohurs.

Let the record be sent down as soon as possible.

A. T. M.

Appeal dismissed.

CRIMINAL REVISION.

Before Mr. Justice Chitty and Mr. Justice Walmsley.

ATAI. HAZRA AND OTHERS

v.

UMA CHARAN CHONGDAR AND OTHERS.

CRIMINAL.

1916.

March, 10.

Auction-purchaser, delivery of possession to—Possession through Court—Judgment-debtor in actual possession—Criminal Procedure Code (Act V of 1898), Sec. 145.

A judgment-debtor should not be allowed in a proceeding under section 145 of the Code of Criminal Procedure to retain possession against his decree-holder auction-purchaser, who has actually been given possession against him by a civil Court, and to assert that possession and drive the decree-holder auction-purchaser back to the civil Court for a further declaration of his rights.

Basanta Kumari Dasi v. Mahesh Chandra Laha (1) distinguished.

Criminal Revision.

The Petitioners 2nd Party made an application to the High Court for setting aside an order passed by a First Class Magistrate of Amta, District Howrah, declaring under section 145 of the Code of Criminal Procedure, the 1st party to be in possession of the lands in dispute until evicted therefrom in due course of law, and allowing the said 1st Party Rs. 30 as cost to be paid by the 2nd Party, and obtained this Rule.

Babu Manmatha Nath Mukherjee for the Petitioners.

Babus Dasarathi Sanyal and *Debendra Narain Bhattacharjee* for the Opposite Party.

The judgment of the Court was as follows :—

In this case, the five petitioners, who are the second party to the proceedings, obtained a decree against Bhusan Chongdar (one of the first party) and Nanda Chongdar, who were entitled to an undivided one-fourth share in a property. This one-fourth share was brought

March, 10.

* Criminal Revision No. 188 of 1916, against the order of Babu Joykani Chakravarty, Honorary Magistrate at Amta, District Howrah, dated the 4th of February, 1916.

(1) (1913) I. L. R. 40 Calc. 982.

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to sale in execution and was purchased by the decree-holders. They obtained delivery of possession through the Court. The present proceedings were taken between the first party, of whom Bhusan Chongdar, one of the judgment-debtors, was one, and the second party, who were the decree-holders. The learned Magistrate has found that, though the second party are undoubtedly entitled by virtue of their purchase to an undivided one-fourth share, they were never in actual possession of the property and that the crop was grown entirely by the first party. He has accordingly declared in favour of the possession of the first party and directed the second party to go to the civil Court.

We do not think that the order in this particular case can stand. It seems contrary to all principles of justice that a judgment-debtor should be allowed to retain possession against his decree-holder who has actually been given possession against him by a civil Court, and, in a criminal proceeding, to assert that possession and, by force of the order of the Magistrate, drive the decree-holder and auction-purchaser back to the civil Court for a further declaration of his rights. This element in the case before us distinguishes it from the case of *Basanta Kumari Dasi v. Mahesh Chandra Laha* (1). With the principles laid down in that case we are fully in accord. We think that the present order cannot be allowed to stand and must be set aside and we order accordingly.

If there is still any likelihood of a breach of the peace, the Magistrate will have power to take steps under section 107, Criminal Procedure Code, to bind down the aggressive parties.

A. N. R. C.

Order set aside.

(1) (1913) I. L. R. 40 Calc. 982.

APPELLATE CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

JAMADAR SINGH

v.

RAJA JAGAT KISHORE ACHARYA CHOWDHURY. *

CIVIL.

1916.

July, 20.

Second appeal—Maintainability of—Bengal Tenancy Act (VIII of 1885), section 153—"The amount claimed in the suit"—Rent—Suit claiming rent and damages for breach of contract—Civil Procedure Code (Act V of 1908), sections 102, 115—Error of law.

The bar provided in section 153 of the Bengal Tenancy Act cannot be evaded by the joinder of a claim for money with a claim for rent.

The expression 'the amount claimed in the suit' in Cl. (a) of section 153 of the Bengal Tenancy Act, has reference to the rent for the recovery whereof the suit has been instituted. The term rent may possibly include whatever is recoverable as rent under the provisions of the Bengal Tenancy Act as also sums ancillary to rent, such as interest on rent in arrears, or statutory damages for non-payment of rent.

A suit was brought for recovery of Rs. 82-8as. as arrears of rent and damages and of Rs. 50 as damages for breach of contract *i. e.*, for recovery of the sum of Rs. 132-8as. A decree was passed in favour of the plaintiff, which was confirmed on appeal :

Held, that a second appeal was barred under section 153 of the Bengal Tenancy Act, in so far as the claim for rent was concerned, and in respect of the claim for damages for breach of contract, a second appeal was equally barred under section 102 of the Code of Civil Procedure.

The High Court cannot interfere under section 115 of the Code of Civil Procedure on the ground that the lower Court has committed an error of law.

Appeal and Application for Revision by the Defendant.

Suit for recovery of rent and damages.

The material facts and arguments are stated in the judgment.

Babu Sasankajiban Roy for the Appellant and the Applicant.

Babu Satis Chunder Ghose for the Respondent and the Opposite Party.

The judgment of the Court was delivered by

Mookerjee, J.—The objection taken by the respondent to the competency of this appeal raises a question of first impression. The plaintiff instituted this suit against the defendant for recovery of a sum of Rs. 132-8 as. He claimed Rs. 82-8 as. arrears of rent and damages ; and he added thereto a claim for Rs. 50 as

* Appeal from Appellate Decree No. 733 of 1914 with Rule No. 656 of 1915, against the decision of Babu Mohim Chandra Chakrabarti, Subordinate Judge of Dacca, dated the 27th November, 1913, confirming that of Babu Nogensdra Nath Ghose, Munsiff of Naraingunj, dated the 8th February, 1913

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damages for breach of contract. His allegation was that the defendant had failed to prepare and deliver certain papers as he had undertaken to do, and had made himself liable under the terms of the agreement between them to pay to the plaintiff the sum of Rs. 50. The defendant protested against the joinder of these claims in one suit; but his objection was overruled. The case was tried on the merits, and a decree was ultimately made against him. That decree has been confirmed on appeal by the Subordinate Judge. On the present appeal, the defendant seeks to contest the propriety of the decision of the Court of appeal below.

A preliminary objection is taken on behalf of the respondent that the appeal is incompetent under section 153 of the Bengal Tenancy Act. That section provides that an appeal shall not lie from any decree passed on appeal in any suit instituted by a landlord for recovery of rent, where the decree is passed by a District Judge, Additional District Judge or Subordinate Judge and the amount claimed in the suit does not exceed Rs. 100, unless the decree has decided one or more of several specified questions. The appellant contends that as this is a suit instituted by a landlord for recovery of rent and the amount claimed in the suit exceeds Rs. 100, the appeal is competent. In our opinion, this argument is based upon a superficial reading of section 153. No doubt, the suit has been instituted by a landlord for recovery of rent, although he has joined to the claim for rent a claim for damages for breach of contract; but the amount claimed on account of rent does not exceed Rs. 100. It is plain that the expression "the amount claimed in the suit" which occurs in clause (a) of section 153, must be read with the words "in any suit instituted by a landlord for the recovery of rent"—which find a place in the introductory paragraph of the section. The "amount claimed" has plainly reference to the rent for the recovery whereof the suit has been instituted. The term 'rent' may possibly include whatever is recoverable as rent under the provisions of the Bengal Tenancy Act as also sums ancillary to rent, such as interest on rent in arrears, or, statutory damages for non-payment of rent. But the legislature could never have intended that the bar provided in section 153 should be evaded by the joinder of a claim for money with a claim for rent. The contention of the defendant in substance is that although there would have been no second appeal, if two different suits had been instituted for the recovery of the arrears of rent and the recovery of damages for breach of contract, by reason of section 153, Bengal Tenancy Act, and section 102, Code of Civil Procedure, he is entitled to evade the provisions

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of both these sections, because the two claims have been amalgamated in one suit. We are clearly of opinion that this argument should not prevail. The result follows that the appeal is barred under section 153, Bengal Tenancy Act, in so far as the claim for rent is concerned. In respect of the claim for damages for breach of contract, there can be no question that the appeal is equally barred, under section 102, Civil Procedure Code.

We have finally been invited to interfere with the decision of the Subordinate Judge in the exercise of our revisional jurisdiction. We are of opinion that this is clearly a case where the Court cannot interfere under section 115, Civil Procedure Code. If the contention of the appellant be conceded to be well-founded, the utmost that can be said is that the Subordinate Judge has committed an error of law; but that is undoubtedly not a ground for interference in the exercise of our revisional jurisdiction. In fact, if we were to accede to the prayer of the appellant, we should allow him an appeal in the disguise of revision, where an appeal is expressly barred by statutory provisions.

The result is that the appeal is dismissed with costs and the Rule is discharged.

A. T. M.

Appeal dismissed : Rule discharged.

Before Mr. Justice Sharfuddin and Mr. Justice Teunon.

LALA DEOSARAN LAL AND OTHERS

v.

BATESWAR MONDAL AND OTHERS.*

CIVIL.

1916.

February, 23.

Occupancy holding—Non-transferable—Purchase by co-sharer landlord, effect of.

The voluntary transfer by the original raiyat is operative against the raiyat and all persons, other than the landlord including a subsequent purchaser from the same raiyat.

Dayamoyi v. Ananda Mohan Roy Chowdhuri (1) referred to.

The fact that the purchasers are co-sharer landlords does not put them in a better position than a stranger purchaser would be.

Appeal by the Defendants first party.

* Appeal from Appellate Decree No. 1967 of 1914 against the decree of N. K. Dutt Esq., District Judge of Purnea, dated the 28th April 1914, reversing the decree of Babu Amsr Nath Chatterjee, Munsiff of Purnea, dated the 5th of July 1913.

(1) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52 F. B.

CIVIL.

1916.

Deosaran

v.

Bateswar.

Suit for confirmation of possession in an occupancy holding on declaration of title.

The material facts and arguments appear from the judgment.

Babu Rajendra Prasad for the Appellants.

Babu Panchanon Ghose (for *Babu Harihar Prasad Sinha*) for the Respondents.

The judgment of the Court was as follows :

February, 23.

This is an appeal by the defendants first party in a suit brought by the plaintiff for confirmation of his possession in an occupancy holding on declaration of his title thereto.

It appears that he purchased it from the original tenant by a deed dated 11th September, 1907. The defendants first party, purchased in 1911 in execution of their own money decree against the same tenants. The District Judge has held that the plaintiff's purchase was a genuine purchase and he has also found that the plaintiff's possession from, and since, the date of his purchase has been proved.

From the decision of the Full Bench of this Court in *Dayamoyi v. Ananda Mohan Roy Chowdhuri* (1), it is clear that the voluntary transfer by the original raiyat made on the 11th September 1907 is operative against the raiyat and also operative against all persons other than the landlord including obviously a subsequent purchaser from the same raiyat. It has been suggested that the fact that the purchasers are co-sharer landlords puts them in a better position than a stranger purchaser would be. No authority for this proposition has been submitted to us and we cannot see why on principle the fact that the subsequent purchaser is a co-sharer landlord should affect the question.

For these reasons, we dismiss this appeal with costs.

R. M.

Appeal dismissed.

(1) (1914) I. L. R. 42 Calc. 172 ; 20 C. L. J. 52 ; 18 C. W. N. 971.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
N. R. Chatterjee.*

DINA NATH DAS

v.

RAMA NATH DAS AND OTHERS. *

CIVIL.

1915.

August, 25.

Limitation—Limitation Act (IX of 1908), Schedule I, Article 120, applicability of—Injunction, prayer for—Entries in record of rights, effect of—Actual claim made on the strength of entry.

Article 120, schedule I. of the Indian Limitation Act is applicable to suits for declaratory reliefs but not for declaratory reliefs with prayer for confirmation of possession and for injunction.

A prayer for injunction is a prayer for consequential relief quite as much as a prayer for confirmation of possession.

Umatul v. Nauji (1) and *Jhumak v. Debu Lal* (2) referred to.

Entries in a record of rights adversely to a plaintiff do not affect his possession, though they may be used in evidence against him in a suit for declaration of title. Time does not begin to run against him till an actual claim is made on the strength of the entry in the record of rights.

Sheopher v. Deomarain (3) and *Rahmatullah v. Shamsuddin* (4) referred to.

Appeal by the Plaintiff.

Suit for declaration of title to land, for confirmation of possession and for issue of a permanent injunction upon the defendants to restrain them from acts of interference with the plaintiff in the enjoyment of the disputed property.

The plaintiff based his title on purchase on the 6th May, 1882, and notwithstanding this, the settlement authorities passed orders in 1898 and 1908 adversely to him. The defendants encouraged by these entries raised obstacles on the 28th November, 1907 to his peaceful possession. Consequently he instituted the present suit on the 4th April, 1910. The defendants *inter alia* pleaded limitation. The primary Court overruled their contention but the appellate Court upheld it. Hence this appeal.

Babu Mohini Mohan Chatterjee for the Appellant.

Babu Satis Chandra Mukerjee (for *Babu Sures Chunder Chuckerbutty*) for the Respondents.

* Appeal from Appellate Decree No. 2098 of 1912, against the decision of Babu Narendra Kristo Datt, Subordinate Judge of Cuttack, dated the 19th April, 1912, reversing that of Babu Sisir Kumar Ghose, Munsiff of Balasore, dated the 25th February, 1911.

(1) (1907) 6 C. L. J. 427.

(2) (1912) 22 C. L. J. 415.

(3) (1912) 10 A. L. J. R. 413.

(4) (1913) 11 A. L. J. R. 377.

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Dina Nath

v.

Rama Nath.

August, 25.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the plaintiff in a suit for declaration of title to land, for confirmation of possession, and for the issue of a permanent injunction upon the defendants to restrain them from acts of interference with the plaintiff in the enjoyment of the disputed property. The case for the plaintiff is that he purchased the land on the 6th May, 1882, from the widow of one Golak Prosad, and that notwithstanding his possession on the basis of this purchase, his name was not registered by the settlement authorities at the time of the periodical settlements. The order in the first of these settlements was made adversely to the plaintiff in 1898, and this was repeated in 1908. The plaintiff states that the defendants, encouraged by these entries, have raised obstacles to his peaceful possession of the disputed property since the 28th November, 1907; he was consequently driven to institute this suit on the 4th April, 1910. The defendants pleaded, *first*, that the vendor of the plaintiff had no interest in the property, as her husband had predeceased her father-in-law, and, *secondly*, that the claim was barred by limitation. The Courts below have concurrently found in favour of the plaintiff upon the question of title. But whereas the trial Court held that the claim was not barred by limitation, the Subordinate Judge has held that the suit is barred under article 120 of the schedule to the Indian Limitation Act, as explained in *Francis Legge v. Rambaran Singh* (1) and *Akbar Khan v. Turaban* (2). On the present appeal, the plaintiff has contended that the view taken by the Subordinate Judge upon the question of limitation is obviously erroneous. The argument in substance is that the suit is in no sense a suit for a pure declaratory decree, as he seeks two-fold consequential relief, *first*, by way of confirmation of possession and, *secondly*, by way of a permanent injunction to restrain the defendants from unlawfully interfering with his possession. In our opinion, the decree of the Subordinate Judge cannot possibly be supported.

It need not be disputed as ruled in the two cases mentioned by the Subordinate Judge and also in the decisions of this Court in the cases of *Mohabharat Shaha v. Abdul Hamid Khan* (3) and *Shyamanund Das v. Raj Narain Das* (4), that article 120 of the schedule to the Indian Limitation Act is applicable to suits for declaratory reliefs. But the present suit is not of that character, as a prayer for injunction is a prayer for consequential relief quite

(1) (1897) I. L. R. 20 All. 35.

(3) (1904) 1 C. L. J. 73.

(2) (1908) I. L. R. 31 All. 9.

(4) (1906) 4 C. L. J. 568.

as much as a prayer for confirmation of possession : *Umatul v. Nauji* (1), *Jhumak v. Debu Lal* (2). Assume however, that this is a suit for declaratory relief. The entries in the record of rights did not affect the possession of the plaintiff, though they might have been used in evidence against him in a possible suit for declaration of title. But the plaintiff was entitled to wait till the defendants had, on the strength of the entry in the record of rights, attempted to disturb his possession. This is clear from the decision in the case of *Sheopher v. Deonarain* (3), where it was pointed out that unless an actual claim was made upon the strength of the entry in the record of rights, time did not begin to run against the plaintiff : *Rahmatullah v. Shamsuddin* (4). In our opinion, even if article 120 be made applicable to this case, the suit has been instituted within six years after the cause of action arose. In this view the decree of the Subordinate Judge cannot be supported. It is needless to remand the case for a finding upon the question of possession, as the trial Court expressly held that the plaintiff was not out of possession and this finding does not appear to have been assailed before the Subordinate Judge.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of appeal below.

A. T. M.

Appeal allowed.

(1) (1907) 6 C. L. J. 427.

(2) (1912) 22 C. L. J. 415.

(3) (1912) 10 A. L. J. R. 413.

(4) (1913) 11 A. L. J. R. 877.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

KRISHNA NATH CHAKRABARTI

".

MAHOMED WAFTZ.*

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Ju'y, 22, 23.

Ejectment—Lessor not a de facto landlord—Lessee not given possession—Principle of Binad Lal Pakrashi's case, if applicable.—Judgment in criminal case, when admissible.

* Appeal from Appellate Decree No. 3649 of 1913, against the decision of Babu Kali Kumar Sarkar, Subordinate Judge of Mymensing, dated the 7th June, 1913, reversing that of Babu Rai Mohan Karmokar, Munsiff of Netrokona, dated the 10th May, 1912.

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The principle laid down in *Binad Lal Pakrashi's* case (1) viz., that an agricultural tenant, who enters upon the land, whether it be firm or alluvial, and holds under a *de facto* proprietor *bona fide*, is entitled to be treated as a raiyat, although the *de facto* proprietor is subsequently proved to be not the real owner, is an encroachment upon the ordinary rule of law that a grantor is not competent to confer upon the grantee a better title than what he himself possesses, and must be cautiously applied and is not to be extended. It is not applicable to *zemit* lands. In order to make the principle applicable, the lessor must be the *de facto* landlord in possession and must have placed the lessee in possession of the land.

A person who obtained a lease of agricultural land from one who had no title to it and was not put in possession of it, has no enforceable claim even as against one who fails to establish his alleged title.

A judgment in a criminal case is admissible in evidence to show what order was made, who the parties to the dispute were, what the land in dispute was and who was held entitled to possession.

Dinomoni v. Brojo Mohini (2) referred to.

Appeal by the Defendant.

Suit for recovery of possession of land on declaration of title.

The disputed property belonged to *A* whose interest therein was terminated by a sale in execution of a decree held on the 22nd September 1910. Subsequently on the 24th November, the plaintiff took a lease of the land from *A* and went to take possession. The result was a dispute with the defendant which culminated in a proceeding under Sec. 107 of the Code of Criminal Procedure. The Magistrate found on the 22nd March that the defendant (then complainant) was in possession and that the accused (now plaintiff) was likely to commit a breach of the peace. On the 15th June, 1911, the plaintiff instituted this suit for declaration of his title under the lease from *A* and for recovery of possession. The primary Court dismissed the suit, but the appellate Court decreed it. Hence this appeal.

Babu Birendra Kumar Dey for the Appellant.

Babu Jatindra Mohan Ghose for the Respondent.

The judgment of the Court was delivered by

July, 23.

Mookerjee, J.—This is an appeal by the defendant in a suit for recovery of possession of land on declaration of title. The disputed property belonged to one Parbuty Sanker Pandey whose interest therein was terminated by a sale in execution of a decree held on the 22nd September, 1910. On the 24th November 1910 the plaintiff took a lease of the land from Parbuty Sanker Pandey and, in his own words, went to take possession. The result was a dispute

(1) (1893) I. L. R. 20 Calc. 708.

(2) (1901) I. L. R. 29 Calc. 187.

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with the defendant which culminated in a proceeding under Sec. 107, Criminal Procedure Code. The Magistrate found on the 22nd March 1911 that the defendant (then complainant) was in possession and that the accused (now plaintiff) was likely to commit a breach of the peace. He consequently directed that the plaintiff should be bound down and should execute a bond to keep the peace for one year. On the 15th June 1911, the plaintiff instituted this suit for declaration of his title under the lease from Parbati Sanker Pandey and for recovery of possession. The Courts below have concurrently found that the lessor of the plaintiff had no subsisting title on the day the lease was granted to him. But while the Court of first instance held that the plaintiff had acquired no title under the lease, the Subordinate Judge has come to the conclusion that the principle of the decision of the Full Bench in *Binad Lal Pakrashi v. Kalu Pramanik* (1) is applicable and that the plaintiff is entitled to a decree for possession as against the defendant who has failed to establish any title to the property. The question for consideration, consequently, is, whether this case is governed by the principle of the decision of the Full Bench, namely, that an agricultural tenant who enters upon land, whether it be firm or alluvial [*Nundo Kumar v. Banomali* (2); *Rajendra Nath v. Nanda Lal* (3)] and holds under a *de facto* proprietor *bona fide*, is entitled to be treated as a raiyat, although the *de facto* proprietor is subsequently proved to be not the real owner: *Amcer Hossein v. Sheo Sulac* (4); *Zoolfun v. Radhica* (5).

As was pointed out by this Court in the case of *Upendra Narain Bhattacharya v. Protap Chandra P'ardhan* (6), this principle is an encroachment upon the ordinary rule of law that a grantor is not competent to confer upon the grantee a better title than what he himself possesses: *Durg'i Nikarini v. Gobardhan Bose* (7); and the Courts have repeatedly ruled that the doctrine must be cautiously applied and is not to be extended. Thus in *Sharoo Dass Mondul v. Joggesur Roy* (8) and *Jonab Ali v. Rakibuddin* (9), the Court refused to apply this doctrine to *zerait* lands. In *Madan Mohan v. Rajkishori* (10), the Court refused to apply the principle in derogation of the rule of *lis pendens*: Again, in *Kazi Nawaz Khoda v. Surendra Nath De* (11), *Peary Mohun Mandal v. Radhika Mohun*

(1) (1893) I. L. R. 20 Calc. 708. (2) (1902) I. L. R. 29 Calc. 871.

(3) (1914) 19 C. L. J. 595.

(4) (1873) 19 W. R. 338.

(5) (1878) I. L. R. 3 Calc. 560; 1 C. L. R. 388.

(6) (1903) I. L. R. 31 Calc. 703; 8 C. W. N. 320.

(7) (1914) 20 C. L. J. 448.

(8) (1899) I. L. R. 26 Calc. 564.

(9) (1905) 1 C. L. J. 303; 9 C. W. N. 571.

(10) (1912) 17 C. L. J. 384.

(11) (1906) 5 C. L. J. 33; I. L. R. 34 Calc. 109.

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Hazra (1), *Upendra Narain v. Protap Chandra* (2), the Court refused to apply the doctrine to cases where the landlord was not in possession in good faith; and it cannot now be disputed that want of good faith either on the part of the lessor or the lessee makes the rules inapplicable. This accords with the decision in *Tepu Mahommed v. Tefayet Mahammad* (3) that in order to make the principle applicable, the lessor must be the *de facto* landlord in possession and must have placed the lessee in possession of the land. This does not in any way conflict with the cases of *Atal Chandra Rishi v. Lakhi Narain Ghose* (4) and *Golam Panja v. Hurish Chunder* (5), where the lessee was brought upon the land by an ijaradar for a term who had authority to settle the land with cultivators. We have consequently the position that in order to make the principle available it is essential that the lessor should be in possession of the disputed property as *de facto* landlord and that in good faith he should have inducted into the land a cultivator who has accepted the settlement in good faith.

Tested in the light of this principle, the plaintiff has no case. It is clear that he took his lease from a person who had no title to confer on him, and he never obtained juridical possession of the disputed property. When he attempted to take possession, he was resisted; the result was a criminal case in which it was found that he was not in possession and that it was necessary to bind him down to keep the peace, so that he might not be free to interfere with the possession of the defendant. In a case of this description, the principle of the rule in *Binad Lal Pakrashi v. Kalu Pramanik* (6) can have no possible application.

We may add that it was faintly suggested that no reference was permissible to the finding of the criminal Court on the question of possession. But in view of the decision of the Judicial Committee in *Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani* (7) it is clear that the judgment in the criminal case was admissible in evidence to show what order had been made, who the parties to the dispute were, what the land in dispute was, and who was held entitled to possession. But, even apart from that judgment, there is sufficient evidence on this record to show that the plaintiff never obtained such possession of the land as would entitle him to

(1) (1904) 5 C. L. J. 9.

(2) (1903) I. L. R. 31 Calc. 703; 8 C. W. N. 320.

(3) (1915) 19 C. W. N. 772.

(4) (1909) 10 C. L. J. 55.

(5) (1872) 17 W. R. 552.

(6) (1893) I. L. R. 20 Calc. 708.

(7) (1901) I. L. R. 29 Calc. 187.

claim the status of a raiyat although he had taken settlement from a person who had no title to confer on him. Indeed, the deposition of the plaintiff shows that it is not his case that he obtained the requisite possession. We must hold accordingly that the plaintiff has no enforceable claim even as against the defendant who has failed to establish his alleged title.

The result is that this appeal is allowed, the decree of the District Judge set aside and the suit dismissed with costs in all the Courts.

A. T. M.

Appeal allowed : Suit dismissed.

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v.

Mahomed.

Mookerjee, J.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
N. R. Chatterjee.*

NAWAB KHAJAH HOBIBULLAH,

v.

KHAJAH ABTIKALLAH AND OTHERS.

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1915.

August, 20.

*Receiver—Appointment of—Principle—Civil Procedure Code (Act V of 1908)
O. 40, R. 1—'just and convenient'—Discretion.*

The words 'just and convenient' in O. 40, R. 1 of the Code of Civil Procedure mean that the Court should appoint a receiver for the protection of property or the prevention of injury, according to legal principle and not that the Court can make such appointment because it thinks convenient to do so. They confer no arbitrary and non-regulated discretion on the Court.

Jagat Tarini v. Nabagopal (1) ; Beddow v. Beddow (2) and Aslatt v. Corporation of Southampton (3) referred to.

It is no ground for the appointment of a receiver that allowances payable to beneficiaries under the deed of wakfnama were not paid from the time the defendant took possession of the properties as mutwali in the absence of any allegation of waste or mismanagement. If it is found that the estate is in danger, because no longer properly managed, or that difficulties have arisen in connection with litigation about the properties comprised in the estate, or that there is good ground to apprehend that the defendant may misapply trust funds, the Court may properly appoint a receiver.

Appeal by the Defendants.

Application in a suit relating to the title to the office of mutwali of an endowment created on the 10th March 1847, for appointment

* Appeal from Order No. 371 of 1915, against the decision of Mr. B. L. Chatterjee, Subordinate Judge of Dacca, dated the 28th July, 1915.

(1) (1907) 5 C. L. J. 270; I. L. R. 34 Calc. 305 (315).

(2) (1878) 9 Ch. D. 89 (93).

(3) (1880) 16 Ch. D. 143 (148).

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of a receiver. It was found that allowances payable to beneficiaries under the deed were not paid from the time the defendants took possession of the properties as mutwalis. But there was no allegation of waste or mismanagement. The learned Subordinate Judge was of opinion that he had a wide discretion under R. 1 of O. 40 of the Code of Civil Procedure and could appoint a receiver if he thought it just and convenient to do so. He therefore allowed the application. Hence this appeal.

Mr. B. Chakrabarty and *Babu Surendra Nath Guha* for the Appellants.

Babus Dwarka Nath Chuckerbutty and *Kali Kinkar Chuckerbutty* for the Respondent.

The judgment of the Court was delivered by

August, 20.

Mookerjee, J.—We are invited in this appeal to consider the propriety of an order for the appointment of a receiver in respect of the subject-matter of the litigation in the Court below. The suit relates to the title to the office of mutwali of an endowment created on the 10th March 1847 and the contesting parties are the rival claimants to that office which was held by Nawab Sir Sulimulla up to the time of his death on the 16th January, 1915. The Subordinate Judge has granted the application for the appointment of a receiver on the ground that it is just and convenient that a receiver should be appointed under clause (1), rule 1 of order 40 of the Code of 1908. On behalf of the defendants it was contended before him that the grounds which justify the appointment of a receiver had not been established. The Subordinate Judge was, however, of opinion that he had a wide discretion under rule 1 of order 40 of the Code, and could appoint a receiver if he thought it just and convenient to do so. The only ground established up to the present stage is that allowances payable to beneficiaries under the deed of the 10th March 1847 have not been paid since the defendant took possession of the properties as mutwali; but there is no allegation of waste or mismanagement. In fact, the plaintiffs intimated to the Court that they were prepared to accept the defendant or his present manager Mr. Hudding as receiver. The defendant, on the other hand, has intimated to this Court, as he did in the Court below, that he was ready and willing to pay into Court regularly the sum payable as allowances under the wakfnama. We are clearly of opinion that no ground has been established for the appointment of a receiver at the present stage.

In view of the observations made by the Subordinate Judge, it is desirable to point out that the words 'just and convenient' in order

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40, R. 1(1), do not mean that the Court can appoint a receiver simply because the Court thinks it convenient to do so. They mean that the Court should make such appointment for the protection of property or the prevention of injury, according to legal principles; as was explained in *Jagat Tarini v. Nabagopal* (1), the object and purpose of the appointment of a receiver is generally the preservation of the subject matter of the litigation, pending a judicial determination of the rights of the parties thereto. They confer no arbitrary and non-regulated discretion on the Court. In support of this view, reference may be made to the cases of *Beddow v. Beddow* (2) and *Aslatt v. Corporation of Southampton* (3). It is conceivable that in the present case the appointment of a receiver may hereafter prove necessary, if circumstances alter; for instance, if it is found that the estate is in danger, because no longer properly managed, or that difficulties have arisen in connection with litigations about the properties comprised in the estate, or, that there is good ground to apprehend that the defendant may mis-apply trust funds, the Court may properly appoint a receiver. But we are clearly of opinion that at the present stage no ground has been established to justify the order for appointment of a receiver.

The appeal is allowed and the order of the Subordinate Judge discharged. This order is made on the basis of the undertaking given by the defendant to pay into Court regularly the sums payable as allowances under the wakfnama of 1847 and to bring into Court the arrears of allowances due; the amount payable in each case to be determined by the Subordinate Judge. The term "allowances" includes all sums payable to the beneficiaries under the wakfnama. When the deposits are made, the beneficiaries will be at liberty to withdraw the sums.

A. T. M.

Appeal allowed.

(1) (1907) 5 C. L. J. 270; I. L. R. 34 Cal. 305 (315).

(2) (1878) 9 Ch. D. 89 (93).

(3) (1880) 16 Ch. D. 143 (148).

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.

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1915.

May, 18, 19.

KRISHNA KUMAR NANDI

v.

JAIKRISHNA NANDI AND OTHERS.*

Mortgage—Mortgage, if can be enforced for so much of the consideration as was paid—Transfer of Property Act (IV of 1882), Sec. 53—Purchaser of a portion of the mortgaged property, if can avoid the transaction.

A mortgage can be enforced for so much of the consideration as is proved to have been paid by the mortgagee to the mortgagor.

Rajani v. Gaur Kishore (1) and *China v. Pedakotiah* (2) referred to.

Section 53 of the Transfer of Property Act does not render the transaction void; it is only voidable at the option of any person defrauded, defeated or delayed.

A purchaser of a portion of the mortgaged property can question the mortgage only in so far as it affects the property acquired by him. But the Court, when it proceeds to grant relief by way of avoidance of the transaction, will do so only on equitable consideration and will apply the principles of justice, equity and good conscience.

If, at the instance of the defendant, who is a purchaser of a portion of the mortgaged property subject to the lien of the plaintiff mortgagee, the mortgage is avoided, he should be granted relief, only on the condition that he satisfies that lien.

Appeal by the Plaintiff.

Suit to enforce a mortgage security.

The material facts and arguments are stated in the judgment.

Babu Brojendra Nath Chatterjee for the Appellant.

Babu Gunada Charan Sen (for *Babu Chandra Kant Ghose*)
for the Respondents.

The judgment of the Court was delivered by

May, 19.

Mookerjee, J.—This is an appeal by the plaintiff in a suit to enforce a mortgage security, which comprised two properties namely a parcel of land and a hut on a second parcel. The mortgage was executed by the first defendant in favour of the plaintiff on the 11th October 1909. The second defendant, a creditor of the first defendant, obtained a decree for money against the mortgagor on the 27th August 1909, and, in execution of that decree, purchased the hut on the second parcel for a sum of Rs. 50. The present suit

* Appeal from Appellate Decree No. 2607 of 1913, against the decision of Babu Romes Chunder Sen, Subordinate Judge of Barisal, dated the 9th May, 1913, modifying that of Babu Monmohan Banerjee, Munsiff of Barisal, dated the 3rd April, 1912.

(1) (1908) I. L. R. 35 Cal. 1051; 7 C. L. J. 586.

(2) (1911) I. L. R. 36 Mad. 29.

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v.

Jaikrishna.

Mookerjee, J.

has been defended by the purchaser, who has been joined as a party on the ground that he has acquired an interest in the equity of redemption subsequent to the mortgage. The Court of first instance found that the plaintiff had failed to prove that any money was advanced on the mortgage and consequently dismissed the suit. Upon appeal the Subordinate Judge found that though the consideration for the mortgage was stated to be Rs. 150, the plaintiff had established that a sum of Rs. 57 only was due to him from the mortgagor under a prior mortgage of the 25th March 1909. The second defendant thereupon contended that a decree should not be made in favour of the plaintiff even for this sum together with interest thereon, because the transaction was voidable under section 53 of the Transfer of Property Act inasmuch as the mortgage had been created with a view to defeat or delay the creditors of the mortgagor. The Subordinate Judge overruled this contention and gave the plaintiffs a decree for realization of the mortgage money by the sale of the first property alone. He exempted the second property from the mortgage lien, on the ground that the transaction was void as against the second defendant, who is a *bonafide* purchaser at a sale held in execution of a decree of his own against the first defendant. Neither party is satisfied with this decision. The plaintiff has appealed and contended that a decree should have been made against both the properties included in the security. The second defendant has appealed and urged that on the facts found by the Subordinate Judge, no decree should have been made even in respect of the first property.

As regards the cross-appeal of the second defendant, we are of opinion that it cannot possibly succeed. The second defendant as purchaser of the equity of redemption in the hut, is in no way interested in the first property, which still belongs to the mortgagor; he cannot consequently be permitted to impeach the decree for the sale of that property.

As regards the appeal of the plaintiff, it has been contended on behalf of the respondent that the Subordinate Judge should have held, on the authority of the decision in *Chidambaram Chettiar v. Sami Aiyar* (1) confirmed on appeal to the Judicial Committee in *Chidambaram Chettiar v. S. Sastrial* (2) that the mortgage transaction, which was voidable under section 53 of the Transfer of Property Act, must be avoided in its entirety and cannot be made the basis of a decree even for such portion of the consideration as is

(1) (1906) I. L. R. 30 Mad. 6.

(2) (1914) 20 C. L. J. 571; I. L. R. 37 Mad. 227.

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Mookerjee, J.

proved to have passed from the mortgagee to the mortgagor. The case mentioned is clearly distinguishable. The Subordinate Judge, has found that the mortgage bond was executed for an antecedent loan of Rs. 57 and an alleged cash payment of Rs. 93, that the payment of the cash consideration was doubtful or had not been proved. He has further found that the plaintiff was not, at the date of the mortgage transaction, aware of the decree obtained by the second defendant nor of its impending execution against the first defendant. There is also no evidence to show that there were other creditors of the mortgagor at the time of the mortgage transaction who were intended to be defrauded or defeated. But the Subordinate Judge seems to have held that the intention of the mortgagor was to put a fictitious statement of consideration in the mortgage bond so that it might be of use to him as against possible creditors at some future time; there is, however, no direct evidence to show that the mortgagee was aware of this fraudulent intention. The facts found by the Subordinate Judge are, consequently, not sufficient to bring the case within the scope of Sec. 53, as explained by this Court in the cases of *Ishan Chunder Das Sarkar v. Bislu Sirdar* (1) and *Hakim Lal v. Mooshahar Salu* (2).

But we need not rest our decision on this basis alone. We shall assume, for our present purposes, that the mortgage is within the mischief of Sec. 53 and that the facts sufficient to justify this conclusion have been found by the subordinate Judge. Still, the question arises, what is the relative situation of the parties to this litigation? Section 53 does not render the transaction void; it is only voidable at the option of any person defrauded, defeated or delayed thereby. Let us assume, also, as was done in the case of *Eastern Mortgage and Agency Co. Ltd. v. Rebati Kumar Roy* (3) that the validity of the mortgage can be questioned by way of defence and that it is not obligatory upon the person prejudicially affected to institute an action to avoid the transaction. If these assumptions are made, the inference follows that the second defendant is entitled to question the mortgage, only in so far as it affects the property acquired by him, namely, the hut on the second parcel. But the Court, when it proceeds to grant relief by way of avoidance of the transaction, will do so only on equitable consideration and will apply the principles of justice, equity and good conscience. In the present case, it is plain from the orders in the execution proceedings

(1) (1897) I. L. R. 24 Calc. 825.

(3) (1906) 3 C. L. J. 260.

(2) (1907) I. L. R. 34 Calc. 999; 6 C. L. J. 410.

wherein the second defendant became the purchaser, that he acquired the hut subject to the lien of the plaintiff. Consequently, if, at his instance, the mortgage is avoided he should be granted relief, only on condition that he satisfies that lien. It follows that the plaintiff is entitled to a decree for his dues as against the second property in the hands of the second defendant. This view is in accord with that taken in the cases of *Rajani Kumar Dass v. Gaur Krishna Saha* (1) and *China Pitchiah v. Pedakotiah* (2) which recognise the principle that a mortgage can be enforced for so much of the consideration as is proved to have been paid by the mortgagee to the mortgagor.

The result is that this appeal is allowed, the cross-objection dismissed, and the decree of the Subordinate Judge discharged. There will be a mortgage decree in favour of the plaintiff against both the properties included in the security. But the decree will direct that the plaintiff must, in the first instance, proceed to realise his dues by sale of the first property. If such sale is not found sufficient to satisfy his dues, he will be entitled to proceed against the second property to recover the balance. As the hut, after purchase by the second defendant, has been demolished and can no longer be brought to sale, the decree will specify the sum recoverable by the plaintiff from the defendant under our judgment. Each party will pay his own costs throughout the litigation.

A. T. M.

Appeal allowed : Cross-objection dismissed.

(1) (1908) I. L. R. 35 Calc. 1051 ; 7 C. L. J. 586.

(2) (1911) I. L. R. 36 Mad. 29.

Before Mr. Justice Richardson and Mr. Justice Roe.

SHIBA DURGA DEBI

v.

GOPI MOHAN SAHA AND OTHERS*.

CIVIL.

1915.

December, 19.

Limitation—Mortgage decree on consent—Time, running of—Personal decree—Civil Procedure Code (Act V of 1908), section 48 cl. (a).

When there are two decrees in a suit, a preliminary decree and a final decree,

* Appeal from Appellate Order No. 183 of 1915, against the order of H. C. Liddle Esq., District Judge of Backergunj, dated the 11th February, 1915, modifying that of Babu Bepin Behari Das Gupta, Subordinate Judge, 2nd Court, at Barisal, dated the 17th June, 1914.

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v.
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for the purpose of clause (a) of sub-section (1) of section 48 of the Code of Civil Procedure, the two together must be taken to be a single and indivisible decree, the date of which is the date of the final decree. It is the final decree which makes the preliminary decree operative and effectual and renders it enforceable in execution.

Ajudhia Pershad v. Baldeo Singh (1) referred to.

Appeal by the Judgment-debtor.

Application for sale of the properties.

On the 10th March, 1896, a decree was made by consent providing for the payment of the amount due by the judgment-debtor in instalments. The condition was annexed that if default were made in the payment of two consecutive instalments, the decree-holder should be at liberty to realise the entire amount due on account of all the kists, past and future, by serving proclamations of sale and by selling at auction the mortgaged properties mentioned in the decree; that if the plaintiffs' dues were not fully satisfied by the price fetched by the sale, the plaintiffs would realise the balance by proceeding against the defendant's other movable and immovable properties left by the deceased debtor (husband of the appellant). The judgment-debtor failed to pay any of the instalments as they fell due. The first default occurred at the end of the year 1896, and the next following default was in April, 1897. On the 24th March, 1900, the decree-holders obtained the decree absolute and subsequently thereto they brought the mortgaged properties to sale in the ordinary course of execution. The last sale took place in the year 1906. In March 1912, the decree-holder applied for the sale of the properties of the judgment-debtor other than those covered by the mortgage. The judgment-debtor filed an objection to this application on the ground that it was barred by limitation under section 48 of the Code of Civil Procedure, 1908. The Courts below decided the question in the decree-holder's favour. Hence this appeal.

Babu Gunada Charan Sen (with him *Babus Sarat Chandra Dutt* and *Jitua Chandra Guha*) for the Appellant: I submit the limitation runs from the date of the preliminary decree under section 48 cl (a) of the Code of Civil Procedure: *Jnnendranath v. Khulna Loan Co.* (2). If Cl. (a) be not applicable, then under Cl. (b) time runs from the date of the second default, i. e., when the decree holder was entitled to realise the whole decretal amount.

Section 48 has a retrospective effect: *Biseswar v. Jasoda* (3).

Moulvi A. K. Fazlul Huq (with him *Babu Kali Prosonno Piplai*) for the Respondents.

(1) (1904) 1 L. R. 21 Calc. 818 (823). (2) (1913) 18 C. W. N. 492.
(3) (1913) 1 L. R. 40 Calc. 704.

Section 48 contemplates a decree which is capable of execution. Before the preliminary mortgage decree is made absolute, the decree is simply a decree *nisi* and cannot be executed. Time runs from the date of order absolute : *Narhar Raghunath v. Krishnaji* (1). A preliminary mortgage decree must be made absolute before execution can be taken : *Hatem Ali v. Abdul Gaffur* (2) ; *Ajudhia Pershad v. Baldeo Singh* (3) ; *Mahabir Prasad v. Sital Singh* (4) ; and *Tiluck Singh v. Parsotein Proshad* (5). The case of *Jnanendra-nath Bose v. Khulna Loan Co.* (6) is distinguishable.

In this case time runs from the date of the second default, for on default I had to apply to make the decree absolute, sell the mortgaged properties and it was only after I had exhausted these remedies that I could execute the personal decree.

Section 48 has no retrospective effect : *Kaunsilla v. Ishri Singh* (7).

Babu Gunada Charan Sen in reply : Order 20 rule 6 shows that the decree in section 48 means a decree in an original suit and not a decree absolute which has to be made under order 34.

The following judgment was delivered :

This is an appeal from the order of the learned District Judge, dated the 11th February, 1915 by which he dismissed an appeal from the order of the learned Subordinate Judge, dated the 17th June, 1914. The matter arises out of a proceeding taken in execution of a decree upon a mortgage and the point involved is one of limitation.

It appears that, on the 10th March 1896, a decree was made by consent providing for the payment of the amount due by the judgment-debtor in instalments. The condition was annexed that if default were made in the payment of two consecutive instalments, the decree-holder (the respondent before us) should be at liberty "to realise the entire amount due on account of all the kists past and future by serving proclamations of sale and by selling at auction the mortgaged properties mentioned in the present decree." Then there is this provision :—"And if the plaintiff's dues are not fully satisfied by the price fetched by the sale, the plaintiffs shall be entitled to realise the balance by proceeding against the defendant's other movable and immovable properties left by the deceased debtor Goluk Chandra Mohanta. The properties mentioned in the plaint remain fully mortgaged and liable for the decretal amount" For

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December, 10.

(1) (1912) I. L. R. 36 Bom. 368.

(3) (1894) I. L. R. 21 Calc 818 (823).

(5) (1895) I. L. R. 22 Calc. 924.

(7) (1910) I. L. R. 32 All. 499.

(2) (1903) 8 C. W. N. 102 (104).

(4) (1897) I. L. R. 19 All. 520.

(6) (1913) 18 C. W. N. 492.

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the translation of the concluding portion of the decree from which we have quoted, we are indebted to the learned pleader for the appellant. Neither the decree itself in its entirety nor the decree absolute to which we are about to refer has been placed before us. Apparently the judgment-debtor failed to pay any of the instalments as they fell due. The first default occurred at the end of the year 1896, and the next following default was in April, 1897. On the 24th March 1900, the decree-holders obtained the decree absolute and subsequently thereto they brought the mortgaged properties to sale in the ordinary course of execution. The last sale took place, as we are informed, in the year 1906. Then, in March 1912 within twelve years of the decree absolute, the decree-holder applied for the sale of the properties of the judgment-debtor other than those covered by the mortgage. In other words he sought to enforce the personal remedy for which provision had been made in the decree of the 10th March, 1896. The judgment-debtor filed an objection to this application on the ground that it was barred by limitation under section 48 of the Code of Civil Procedure, 1908. The Courts below have decided the question in the decree-holder's favour, and the judgment-debtor has appealed.

The arguments urged on the appellants' behalf by his learned pleader are to the following effect. As to clause (a) of sub-section (1) of section 48 C. P. C., it is said that if limitation is to be computed from the date of the decree sought to be executed, the decree to which we ought to look for this purpose is the decree of the 10th March, 1896, and not the decree absolute of the 24th March, 1900. As to clause (b) of sub-section (1) of section 48, the contention is that the limitation should run, at the latest, from the time when default was made in paying two consecutive instalments, that is, from April, 1897. If these contentions are correct, the decree-holders' application is barred whichever of the two clauses is applied. In the view we take, however, clause (b) need not be considered. It has no application to the present case because the decree-holder is not seeking to enforce his remedy in respect of the default in paying the instalments but in respect of the fact that the proceeds of the sales of the mortgaged properties were not sufficient to meet his claim.

In regard to clause (a) the appeal fails in our opinion on this ground that when there are two decrees in a suit as here a preliminary decree and a final decree or decree absolute, it is not possible to treat them as separate and distinct decrees. The final decree is the complement of the preliminary decree, and for the

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purpose of clause (a) of sub-section (1) of section 48, the two together must be taken to be a single and indivisible decree the date of which is the date of the final decree or decree absolute; or possibly it may be more correct to say that it is the final decree which makes the preliminary decree operative and effectual and renders it enforceable in execution. In that view it is the final decree which is executed. We do not stop to consider whether it was necessary to obtain a decree absolute in this case in addition to the consent decree of the 10th March 1896. A decree absolute was in fact made and must now be assumed to have been properly made. Its precise terms are not before us and on the materials which are before us the decree which has been put in execution must be taken to be the preliminary decree read with the final decree. It is idle to say that the personal remedy which the decree-holder is seeking to enforce is to be found in the preliminary decree. The personal remedy was not available till after the mortgaged properties had been sold under the decree absolute.

The learned pleader has invited our attention to the case of *Jnanendranath Bose v. Khulna Loan Co.* (1). The point, however, that was then decided is not the point before us now. We have referred to the paper-book, and we find that the application for execution in that case was made more than twelve years after the date of the final decree. That case therefore, does not help us. On the other hand the learned pleader for the decree-holder respondent has referred us to other cases, which support the view we take. It was said in the case of *Ajudhia Pershad v. Baldeo Singh* (2) that until the decree absolute is made, there is in fact no decree capable of execution and this observation was repeated in *Hatem Ali Khundkar v. Abdul Gaffur Khan* (3).

The result is that the appeal must be dismissed with costs. We assess the hearing-fee at five gold mohurs.

A. T. M.

Appeal dismissed.

(1) (1913) 18 C. W. N. 492.

(2) (1894) I. L. R. 21 Calc. 818 (823).

(3) (1903) 8 C. W. N. 102 (104).

Before Mr. Justice Teunon and Mr. Justice Chaudhuri.

MADAN CHANDRA PAI AND OTHERS

v.

KIRTIRAM BISWAS AND ANOTHER.*

CIVIL.

1916.

March, 20, 30.

Admissibility in evidence—Proceedings not inter partes.

Proceedings in and documents filed in a previous suit are relevant evidence against a person not a party to that suit.

Appeal by the Plaintiffs.

Suit for possession of land.

The material facts and arguments appear from the judgment.

Babus Joges Chunder Roy and Sarat Chunder Ghose for the Appellants.

Babu Jadu Nath Kanjilal for the Respondents.

C. A. V.

The judgment of the Court was as follows :

March, 30.

The most important points in dispute between the parties in this case are the position and the situation of the Bashabati Khal and the Bashabati Shisha Khal, but we regret to say that the findings of the learned Subordinate Judge about them are unsatisfactory, especially as his judgment is one of reversal. There is not much difficulty in following the decision of the learned Munsiff. He refers to the plaintiff's potta under Soshi Bhusan Bhattachajee and Hari Mohan Dutt, Exhibit 1, dated 1st Assar, 1302 and the kabuliat, Exhibit xi, dated the 30th Kartic, 1303, executed by Tahar Sheikh and others in favour of the plaintiffs, and comes to the conclusion that it is clear from them that Bashabati khal forms the western boundary and Bashabati Shisha khal, the southern boundary of the land of the plaintiffs' jama, as well as of the land let out by them to Taher Sheikh and others. He then says that "if the khal shown in the civil Court Amin's map as running by the western side of the land in suit be Bashabati khal, and the khal shown in that map as running by the southern side of the land in dispute be Bashabati Shisha khal, as alleged by the plaintiffs, then the land in suit is clearly included within the plaintiffs' jama and the jama of Taher Sheikh and others as described in exhibit i and exhibit xi. But on the other hand, the khal shown in the Amin's map as flowing by the south of the land in suit and then flowing northward for some

* Appeal from Appellate Decree No. 1116 of 1912, against the decree of Babu Chandra Bhusan Ranerjee, Additional Subordinate Judge of Khulna, dated the 29th January, 1912, reversing that of Babu Akshoy Kumar Bose, Munsiff 1st Court, of Khulna, dated the 23rd March, 1911.

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distance along its eastern side be the main channel of Bashabati khal, as contended by the defendants, then the land in suit falls outside those jamas." He holds that exhibit xi is a genuine document which was executed before there was any dispute between the plaintiffs and the defendants, and says that the evidence of the defendants about the position of the land covered by exhibit xi is conflicting, and holds upon a consideration of exhibit i, and exhibit xi and exhibit vii, which is an application for execution by the defendants against Taher Sheikh and others, *that there is a Shisa khal to the south of the land of the plaintiffs' jama* and from the failure on the part of the defendants' witness to locate the land of the plaintiffs' jama, he accepts the plaintiffs' case and says that he is supported by amongst other documents the proceedings in the rent suit No. 1038 of 1899 instituted by the Chatterjee Talukdars against the lessors of the plaintiffs and the civil Court Amin's map and report exhibits ii and iii therein filed.

The learned Subordinate Judge has entirely disregarded these proceedings and exhibits, as inadmissible in evidence against the defendants, because they were not parties to the rent suit No 1038. *Gujju Lall v. Fatteh Lall* (1), has been considerably modified by the Privy Council decision in *Ram Ranjan Chakerbuti v. Ram Narain Singh* (2) and other cases, among them *Tepu Khan v. Rajani Mohun* (3). The learned Subordinate Judge has overlooked the fact that a map prepared at that time is of considerable value in determining the question before him. We think that he ought to have treated them as evidence especially as the defendants had the fullest opportunity of rebutting such evidence before the trial Court. The defendants' lease is no doubt prior in date to the lease granted by the Chatterjee to the Plaintiffs' lessors, but the defendants are not the lessors of the whole of west Bajna, but of only 200 bighas of that mahal, a fact which he has apparently overlooked. He has fallen into serious error in saying that the fact that the disputed land is in West Bajna and not in East Bajna is sufficient to negative the plaintiff's title. We do not know how far this erroneous view may have influenced his decision. The learned Subordinate Judge has in fact been unable to come to any definite finding on the oral evidence and a finding such as the following, is not of much value. He says "It seems not likely that the said southern boundary is the Bashabati Sisha Khal as depicted in the Amin's map. It is rather the small Khal shown in the previous map Ex. 3." He gets rid of Ex. vii. by

(1) (1880) I. L. R. 6 Calc. 171 F. B.

(2) (1894) I. L. R. 22 Calc. 533.

(3) (1898) I. L. R. 25 Calc. 522 F. B.

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saying that the boundaries as given therein in the year 1307 appear to have been copied from those given in Taher's lease Ex. xi and then concludes that the plaintiff has failed to prove his title.

As we have said before that the learned Subordinate Judge's judgment is one of reversal and ought therefore to contain clear findings about the position and situation of the two khals above mentioned. We set aside his decree and remand the case to him for reconsideration after admitting the evidence he has rejected. Costs of this appeal to abide the result.

A. T. M.

Appeal allowed : Case remanded.

Before Mr. Justice Teunon and Mr. Justice Chaudhuri.

NAFAR CHANDRA PAL CHOWDHURY

v.

RAHAMAN SHEIKH AND OTHERS.*

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 1916.
 March, 21, 30.

Occupancy holding—Continuous realisation of rent at an illegal rate—Contract, enhancing rent at more than 3 as. in the rupee, if void—Holding, division of—New tenancy—Bengal Tenancy Act (VIII of 1885), Sec. 29 cl. (b), proviso (1), Sec. 178 (1) (b).

Proviso (1) to section 29 of the Bengal Tenancy Act does not control cl. (b) of the section and continuous realisation of rent at an illegal rate is of no avail to the landlord when he seeks the assistance of the Court

The tenants entered into a contract with the landlord by signing the rent-roll, for payment of enhanced rent exceeding 2 annas in the rupee. The contract was not registered :

Held, that the contract was wholly void.

Kristodhone v. Brojo Gobindo (1) followed.

Where it was found as a fact that the pre-existing holding was divided between two brothers of the tenant :

Held, that in the absence of an intention of the parties to that effect, the division had not the effect of creating new tenancies and thus of taking away the pre-existing occupancy rights.

Mulluck Chand v. Satis (2) and *Grant v. Ram Rekha* (3) followed.

That under Sec. 178 cl. (1) (b), the occupancy right in existence could not be taken away by the contract.

* Appeals from Appellate Decrees Nos. 1602 and 1736 to 1765 of 1911, against the decrees of the District Judge of Nadia, dated the 27th March, 1911, modifying those of the Munsiff, 2nd Court, of Krishnagore dated, the 28th April, 1910.

(1) (1897) I. L. R. 24 Calc. 895.

(2) (1909) 11 C. L. J. 56.

(3) (1910) 14 C. L. J. 110.

Appeals by the Plaintiff.

Suits for rent.

The material facts and arguments appear from the judgment.

Babus Hara Prosad Chatterjee and *Amarendra Nath Bose* for the Appellant.

Babus Surendra Nath Guha and *Jogendra Kumar Dey* for the Respondents.

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v.

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C. A. V.

The judgment of the Court was as follows :

These 31 appeals arise out of suits for rent.

The plaintiff landlord sued 62 tenants of village Andulia on the basis of a measurement and of a rent roll prepared in accordance thereunder in the year 1891. His case was that rents had been paid in accordance with the rent-roll from the year 1891 to 1906. When in the latter year he demanded agreements for the payment of enhanced rents the tenants declined to make any payments whatever, and he was therefore compelled to sue.

March, 30.

The defence was that in 1891 the tenants were raiyats with rights of occupancy, that the rentals entered in the rent-roll represented illegal and excessive enhancements contravening the provisions of section 29 of the Bengal Tenancy Act, that they had never consented to the rent roll, and had never paid the rents entered therein.

In the Court of first instance the 62 suits were tried in 3 groups or batches and were all decreed. In 31 cases appeals to the District Judge followed. In 28 of these cases the appeals were allowed and decrees given at the rents admitted by the tenants. In three cases the District Judge found that the tenants had signed the rent-roll and therefore allowed an enhancement of 2 annas in the rupee over the admitted rents. Hence the 31 appeals to this Court, and 3 cross-appeals by the tenants.

The plaintiff sought to avoid the operation of section 29 of the Bengal Tenancy Act by asserting that on his measurement (which followed upon his purchase of the mahal) the tenants of the village relinquished or abandoned their old holdings, and that the rent-roll of 1298 represented new settlements. On the evidence before him the District Judge has very properly negatived this case and has held that the old tenancies continued.

As to payment of rent from and after the year 1298 the judgment in appeal is not very happily worded, but in effect the District Judge disbelieves the plaintiff's collection papers, is of opinion that any excess collections entered therein may be explained by reference to payments made on account of what are known as utbandi lands

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and holds that the plaintiff has failed to show that he realised rents in accordance with the rent-roll of 1298, or indeed at any rates exceeding those paid prior to that year. It was suggested in argument that the explanation offered by the District Judge of the entries in the collection papers is not suggested in the written statements and is not based on evidence. The written statements are no doubt confined to the several holdings in respect of which the suits are brought but extracts from the evidence which have been placed before us show that the contention that the District Judge's explanation of the entries in the collection papers is not suggested by the evidence is not well founded.

But even if the criticisms on the Judge's findings on the question of realization were well-founded this would not advance the appellant's case. It is now settled law that proviso (i) to section 29 of the Bengal Tenancy Act does not control clause (b) of the section, and that continuous realization of rent at an illegal rate is of no avail to the landlord when he seeks the assistance of the Court.

Lastly it is contended on behalf of the appellant that there is no finding that the tenant defendants had in 1298 acquired the status of occupancy raiyats, and further that there is no finding as to the rents then paid.

But from the issues, and from the manner in which the cases were dealt with in the Courts below, and also from the extracts from the plaintiff's evidence that have been read to us it is clear that on those points there was no controversy in the Courts below. It was never disputed that in 1298 the tenants were occupancy raiyats and that if the old tenancies continued the rents entered in the rent-roll of that year were in fact enhanced rents exceeding the rents previously payable by more than 2 annas in the rupee.

We may add that the Judge's finding is in effect that the rents admitted by the tenants were the rents previously payable.

In the 3 cross-appeals it is clear that the Judge has fallen into error. In those cases he finds that by signing the rent-roll the tenants entered into a contract for the payment of enhanced rent. But in the first place the contract is not registered and in the next place as it provides for an enhancement exceeding 2 annas in the rupee it is wholly void: *Kristodhone v. Brojo Gobindo* (1).

In one of these three cases it next appears that the pre-existing holding had been divided between two brothers. It is suggested that this division being a contract between the landlord and the tenant has the effect of creating new tenancies and therefore of

taking away the pre-existing occupancy rights. Certainly if this was not the intention of the parties, the division could not have the effect suggested : *Mulluck Chand v. Satis* (1); and *William Grant v. Ram Rekha* (2). No question as to any such intention was raised in either of the Courts below.

Further the provisions of section 178 (1) (b) of the Bengal Tenancy Act would seem to be a sufficient answer to this contention.

In the result the appeals are dismissed with costs, and the 3 cross-appeals are decreed with costs in all Courts.

A. T. M.

Appeal dismissed : Cross-appeals decreed.

(1) (1909) 11 C. L. J. 56.

(2) (1910) 14 C. L. J. 110.

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Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.

KASHI NATH PAL AND OTHERS

v.

RAJA JAGAT KISHORE ACHARYYA

CHOWDHURI AND OTHERS.*

CIVIL.
—
1915.
June, 1, 2.

Evidence, admissibility of—Recitals in judgment not inter partes—Evidence Act (I of 1872) Secs. 11, 90—Ancient document—Authority of person making grant.

All judgments are conclusive of their existence, as distinguished from their truth; judgments, as public transactions of a solemn nature, are presumed to be faithfully recorded. Every judgment is, therefore, conclusive evidence, for or against all persons, whether parties, privies or strangers, of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered; in other words, the law attributes unerring verity to the substantive as opposed to the judicial portions of the record.

The recitals in a judgment cannot be used as evidence in a litigation between other parties.

Section 90 of the Indian Evidence Act, does not prove the authority of the person who has made the grant, the genuineness whereof is presumed by the Court under the provisions of that section.

Thakoor Pershad v. Bashmutty (1); *Ubilack v. Dallial* (2); and *Uggrakant v. Hurro Chunder* (3) referred to.

* Appeal from Appellate Decree No. 3198 of 1912, against the decision of J. D. Cargill Esq. District Judge of Mymensingh, dated the 13th August, 1912, reversing that of Babu Latu Behary Bose, Subordinate Judge of Mymensingh, dated the 21st September, 1911.

(1) (1875) 24 W. R. 428.

(2) (1878) I. L. R. 3 Calc. 557.

(3) (1880) I. L. R. 6 Calc. 209.

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Jagat Kishore.

Appeal by the Plaintiffs.

Suit for recovery of possession of a share of land on declaration of shikmi taluki right thereto.

The material facts and arguments are stated in the judgment.

Babus Nilmadhub Bose, Bisant Coomar Bose and Bepin Chandra Bose for the Appellants.

Babus Dwarka Nath Chuckerbutty, Gobind Chunder Dey Roy and Satis Chunder Bhattacharjee for the Respondents.

C. A. V.

The judgment of the Court was delivered by

June, 2.

Mookerjee, J.—This is an appeal by the plaintiffs in a suit for recovery of possession of a share of land on declaration of shikmi taluki right thereto. The subject matter of the litigation is waste land in Mouzah Gurai included in estates 51 and 80 of the Collectorate of the District of Mymensingh. These estates were sold in 1833 for arrears of revenue and passed into the hands of one Bhowani Kishore Acharja Chowdhury, the predecessor in interest of the first defendant. According to the plaintiff, the defaulting proprietor or his predecessor had created six shikmi taluks, which comprised the whole village excluding 2 kanis of private land held in the possession of the proprietor and some specific lands comprised in two other taluks Chand Ram and Siva Ram. The plaintiffs set out their title by transfer and succession from the tenure-holders and allege that they have been wrongfully kept out of possession by the first defendant. The first defendant defended the suit mainly on the grounds that the six shikmi taluks did not cover all the lands of the village to the exclusion of 2 kanis of proprietor's private lands and the specific lands of the two other taluks already mentioned; they also contended that the six taluks did not exist from before the Permanent Settlement and that the plaintiffs had no right to the specific lands claimed by them. The Subordinate Judge in a careful judgment decided all the points in favour of the plaintiffs and made a decree in their favour. Upon appeal the District Judge in an elaborate judgment has differed from the conclusions of the Subordinate Judge and has dismissed the suit. On the present appeal, the decision of the District Judge has been assailed substantially upon two grounds of law; *first*, that reliance should not have been placed upon the facts stated in the report of the decision of the Judicial Committee in the case of *Wise v. Bhoobun Moyee Debia Chowdrainee* (1) which related to the same estate although not to the lands now in controversy;

(1) (1865) 10 M. I. A. 165; 3 W. R. P. C. 5.

and, *secondly*, that the District Judge has allowed the defendant to succeed on a case not specifically made in the Court of first instance.

As regards the first ground, it is plain that in the Court of first instance reference was made to the judgment of the Judicial Committee in *Wise v. Bhosbun Moyee* (1) in order to meet the objection that the sikmi taluks were not mentioned in the quinquennial papers of 1302. What happened in the lower appellate Court was that the defendant relied upon facts in the history of the title to this property, stated in the judgment of the Judicial Committee and the District Judge has made such facts the basis of his judgment. The result has been that he has come to the conclusion that the plaintiffs had failed to explain how two of their predecessors Ibrahim and Masam could grant a valid sanad in 1807 and Asan Bibi another valid sanad in 1809. In our opinion, the judgment of the Judicial Committee in a suit not *inter partes* could not be used for the purpose for which it was used by the defendant in the Court below. It is well-settled that although a judgment not *inter partes* may be used in evidence in certain circumstances, as a fact in issue, or as a relevant fact, or possibly as a transaction, [*Ram Ranjan v. Ram Narain* (2); *Blitto v. Kesho Pershad* (3); *Dinomoni v. Brojo Mohini* (4); *Tepu Khan v. Rajani* (5); *Malcolmson v. O' Dea* (6); *Bristow v. Cormican* (7)] the recitals in the judgment cannot be used as evidence in a litigation between other parties. The principle is that all judgments are conclusive of their existence, as distinguished from their truth; judgments, as public transactions of a solemn nature, are presumed to be faithfully recorded. Every judgment is, therefore, conclusive evidence, for or against all persons, whether parties, privies or strangers, of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered; in other words, the law attributes unerring verity to the substantive as opposed to the judicial portions of the record. We hold accordingly that the judgment of the Judicial Committee could not be used in proof of the facts stated therein and the first ground must prevail.

As regards the second ground, namely, that the plaintiffs were taken by surprise by the argument which was advanced on behalf of the defendant in the lower appellate Court, we may observe that

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(1) (1865) 10 M. I. A. 165 (174).

(2) (1894) I. L. R. 22 Calc. 533; L. R. 22 I. A. 60.

(3) (1896) L. R. 24 I. A. 10; I. L. R. 19 All. 277.

(4) (1901) L. R. 29 I. A. 24; I. L. R. 29 Calc. 187.

(5) (1898) I. L. R. 25 Calc. 522 F. B.

(6) (1863) 10 H. L. C. 593.

(7) (1878) 3 App. Cas. 641 (668).

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*lookerjee, J.

it is in a sense closely connected with the first objection. The plaintiffs relied upon three old sanads whose genuineness was questioned by the defendants in both the Courts below. The Subordinate Judge as also the District Judge, however, have concurrently found in favour of the plaintiffs. This, no doubt, did not necessarily show that the grantors of the sanads were competent to carve out the interest which they really intended to create. It is well-settled that Sec. 90 of the Indian Evidence Act does not prove the authority of the person who has made the grant the genuineness whereof is presumed by the Court under the provisions of that section. If it were necessary to rely upon authority in support of this position, reference may be made to the decisions in *Thakoor Pershad v. Bashmutty* (1), *Ubilack Rai v. Dallial Rai* (2) and *Uggrakant Chowdhry v. Hurro Chunder Shikdar* (3). A similar view has been taken in respect of ancient documents under the English Law: *Re Airy* (4). But the point here is that this objection to the validity of the sunnads was not specifically raised in the trial Court; when taken and for the first time in the Court of appeal below, it was rested on fact recited in the judgment of the Judicial Committee already mentioned, but not proved in this suit. The plaintiffs were taken by surprise and have, we think, a legitimate grievance; if the objection had been taken, as it might have been, in the primary Court, the plaintiffs might have adduced evidence to explain away the circumstances apparently adverse to their case. Indeed, this is more than probable, for they have, in this Court, actually referred to two ancient documents, namely, applications in Court dated 16th December 1804 and 7th February 1805, which, as alleged in a petition presented to us, they have discovered since the date of the decision of the District Judge, and which, they contend, fully explain how the predecessors of the plaintiffs were competent to carve out the interest which they actually created by the sanads mentioned. The appellants have invited us to receive these documents in evidence; we are of opinion that the application should be granted in the interests of justice. But in view of the course we intend to adopt, we must decline to accede to the prayer of the appellants that we should discuss in detail the legal effect of the facts found by the District Judge. If we were to adopt that course, we might influence the decision of the District Judge after remand which would be obviously unfair as the facts must be re-investigated by him in the light of the documents now

(1) (1875) 24 W. R. 428.

(2) (1878) I. L. R. 3 Calc. 557.

(3) (1880) I. L. R. 6 Calc. 209.

(4) (1897) 1 Ch. 164.

produced by the appellants. But we desire to add that a perusal of the judgment of the Subordinate Judge shows that the arguments which he adduced in support of his view require serious consideration, and that till those reasons have been successfully met, his decision should not be reversed.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him in order that the appeal may be reheard. The documents which have been produced before us will be sent down to the District Judge to be considered along with the other evidence in the case. The parties will be at liberty to adduce evidence to elucidate the question of the competence of the grantors of the sanads to create the interest actually created by those instruments. The costs of this appeal will abide the result.

A. T. M.

Appeal allowed : Case remanded.

CIVIL.

1915.

Kashi

v.

Jagat Kishore.

*Mookerjee, J.**Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.*

GIRJA KANTA CHAKRABARTI AND OTHERS

v.

MOHIM CHANDRA ACHARJI.*

CIVIL.

1915.

June, 1, 2.

Ejectment, suit for—Mortgage of entire property by some of the sharers—Suit on mortgage—Death of one of the mortgagors before suit—Representative, suit against—Representative interested in his own right—Ex parte decree—Sale in execution—Symbolical delivery of possession—Effect of—Suit by execution-purchaser for possession, if maintainable—Civil Procedure Code (Act V of 1908), Secs. 11, 47—Mortgage, validity of, if can be raised by stranger—Constructive res judicata—Decree, if can be impeached on the ground of fraud by separate suit—Objection as to invalidity of decree, if can be raised for the first time in appeal—Transfer of Property Act (IV of 1882), Sec. 44—Execution-purchaser, a stranger, if can be placed in actual possession of a dwelling house.—Auction-purchaser, remedy of.

An *ex parte* decree can be impeached on the ground of fraud by way of defence to the claim of the plaintiff. Such a defence cannot be raised for the first time in appeal, if no issue was directed on the point in the first Court.

* Appeal from Appellate Decree No. 3486 of 1912, against the decision of Babu Beeraja Charan Mitra, Subordinate Judge of Faridpur, dated the 12th July, 1912, modifying that of Babu Profulla Chandra Guha, Munsiff of Chikandi, dated the 30th March, 1911.

CIVIL.

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v.
Mohim.*Rajib v. Lakhan* (1) and *Nistarini v. Nundo Lal* (2) referred to.

The question of the validity of a mortgage as against one who is not a party thereto, cannot be properly raised and determined in a suit to enforce the security : *Jageswar v. Bhuban* (3) and *Bhaja v. Chuni Lal* (4) referred to. The position is not altered by the circumstance that one of the mortgagors was dead at the commencement of the suit and one of his representatives is a person interested in his own right in the hypothecated property, adversely to the mortgagor. The fact that such a representative did not impeach the validity of a mortgage in a suit on the mortgage brought against him as the representative of the mortgagor, does not preclude him under the doctrine of constructive *res judicata* from urging such plea in a suit for possession brought against him by the purchaser in execution of a mortgage decree.

Where the purchaser in execution of a mortgage decree, of a share of a dwelling house belonging to an undivided family, is not a member of the family, the Court can either direct delivery of possession by partition in execution proceedings or leave him to his remedy by a separate suit for partition.

The obtaining of a symbolical delivery of possession after the confirmation of a sale is operative against the judgment-debtor, who from the date thereof becomes a trespasser. A suit by the execution-purchaser against the judgment-debtor for recovery of possession is not barred by section 47 of the Code of Civil Procedure.

Sasi Bhusan v. Radha Nath (5) followed.

Appeal by the Defendants.

Suit for possession of land and huts on declaration of title by purchase at a sale in execution.

The material facts and arguments are stated in the judgment.

Babu Prokas Chandra Mojumdar for the Appellants.*Babu Mukund Nath Roy* for the Respondent.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the defendant in a suit for possession of land and huts on declaration of title by purchase at a sale in execution of a mortgage decree. The facts essential for the decision of the questions of law raised before us may be briefly stated. Three brothers A, B and C were owners of the disputed property, and their interest may be regarded as the unit for our present purpose. On the 18th December 1887, A and B executed a mortgage in favour of the plaintiff; they dealt with the entire property and apparently ignored the interest of their brother C. A died in 1892 and left his two brothers B and C as his representatives. On the 13th November 1895, the mortgagee sued B and C to enforce his security. B was made a party in his character as one

(1) (1899) I. L. R. 27 Calc. 11.

(2) (1899) I. L. R. 26 Calc. 891; on appeal (1902) I. L. R. 30 Calc. 369.

(3) (1906) I. L. R. 33 Calc. 425; 3 C. L. J. 205.

(4) (1906) 5 C. L. J. 95.

(5) (1914) 20 C. L. J. 433.

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of the original mortgagors, and also as one of the representatives of A; C was described only as the representative of his deceased brother A. There was no allegation in the plaint that the mortgage, though executed by A and B, was operative against C, either because the debt had been incurred for family purposes or because A and B had implied authority to bind their brother C. Neither B nor C entered appearance and an *ex parte* decree was made on the 19th December 1895. The decree was executed in due course; the property was brought to sale and passed into the hands of the plaintiff. The plaintiff as execution purchaser obtained symbolical delivery of the property, but not actual possession. He accordingly instituted the present suit on the 6th August 1907 to eject the defendants who are the representatives of B and C, as C had died in 1898 and B in 1901. The Court of first instance decreed the suit in part. Upon appeal the Subordinate Judge has decreed the claim in full. On the present appeal, four points have been urged on behalf of the defendants; *first*, that the suit was barred under Sec. 47 C. P. C. and that the remedy of the plaintiff was by way of an application to the execution Court to be placed in actual possession of the purchased property; *secondly*, that the defendants are at liberty to impeach the *ex parte* decree as fraudulently obtained and consequently inoperative; *thirdly*, that the defendants are not bound by the doctrine of *res judicata* and are entitled to establish that the plaintiff has acquired title, if at all, to only two-thirds share of the property, that is, only to the interest of the two mortgagors A and B; and *fourthly*, that there should be no decree for joint possession of the huts, which are used for residential purposes by the family of the mortgagors and of their deceased brother.

As regards the first ground, there is plainly no substance in it. The plaintiff obtained symbolical delivery after the sale had been confirmed. That delivery was operative against the judgment-debtors, who from the date thereof became trespassers. The plaintiff can consequently sue to recover actual possession from them. This view is in accord with the decision in *Sasi Bhusan v. Radha Nath Bose* (1), where this Court dissented from the contrary opinion expressed by the Bombay High Court in *Sadashiv v. Narayan* (2), and by the Madras High Court in *Kattayat v. Raman* (3). We are accordingly of opinion that the suit as framed is maintainable.

As regards the second ground, it need not be disputed, that as was

(1) (1914) 20 C. L. J. 433.

(2) (1911) I. L. R. 35 Bom. 452.

(3) (1902) I. L. R. 26 Mad. 740.

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ruled by this Court, in *Rajib Panda v. Lakhan Sendh* (1) and *Nistarini v. Nundo Lall* (2), the defendants are competent to impeach the *ex parte* decree on the ground of fraud by way of defence to the claim of the plaintiff. But the answer to the contention of the appellant is that no issue was raised on this point and they cannot be permitted to attack the decree as fraudulent, when the question is not covered by any of the issues and the evidence has not been directed to the elucidation of this matter.

As regards the third ground, we are of opinion, that the appellants have a legitimate grievance. They contend that C was made a party to the mortgage suit as a representative of his deceased brother A and that consequently the question whether the mortgage was operative against him in his personal capacity was not and could not have been raised in that litigation. There is no answer to this argument. It is, besides, clear from the decisions in *Jageswar Dutt v. Bhuban Mohan Mitra* (3), and *Bhaja Chowdhuri v. Chuni Lal Marwari* (4) that the question of the validity of the mortgage as against C, who was not a party thereto, could not have been properly raised and determined in a suit to enforce the security. The position was not altered by the circumstance that one of the mortgagors was dead at the commencement of the suit and one of his representatives was a person interested in his own right in the hypothecated property adversely to the mortgage. We hold accordingly that the question now in controversy, namely, was C bound by the mortgage, was not only not raised but could not have been raised in the mortgage suit as framed. The decision of this matter is thus not barred by the doctrine of constructive *res judicata*. On the merits, it is plain that no circumstances have been established which would justify the conclusion that the mortgage, though executed by A and B, also bound the interest of C. The inference follows that the plaintiff has acquired the interest of A and B alone and not that of C. Consequently, the plaintiff is entitled to a declaration of title to the extent of a two-thirds share exclusive of the share of C.

As regards the fourth ground, we are of opinion that the plaintiff a stranger to the family should not be placed in actual joint possession of the huts in which the defendants reside, whatever the strict rights of the plaintiff may be, as purchaser of a two-thirds share of the disputed property. Section 44 of the Transfer of Property Act

(1) (1899) I. L. R. 27 Calc. 11.

(2) (1899) I. L. R. 26 Calc. 891; (1902) I. L. R. 30 Calc. 369.

(3) (1905) I. L. R. 33 Calc. 425; 3 C. L. J. 205.

(4) (1906) 5 C. L. J. 95.

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provides that where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in the section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house. The proper course to follow is either to direct delivery of possession by partition in execution proceedings or to leave the purchaser to his remedy by a separate suit for partition: *Kesubnath v. Hurgovind* (1); *Ramtanzo v. Govind* (2); *Kowar Bijoy v. Samasundari* (3); *Eshan Chunder v. Nund Coomar* (4); *Futteh v. Jankie* (5); *Rajani v. Ram* (6). This applies with much greater force to cases under the Mitakshara Law: *Kalee Pudo v. Choitun* (7); *Kallapa v. Venkatesh* (8). If the contrary view were maintained, results would follow which are best described in the weighty words of Westropp C. J. in *Balaji v. Ganesh* (9): "it is a far safer practice, and less likely to lead to serious breaches of the peace, to leave a purchaser to a suit for partition than to place him by force in joint possession with members of a Hindu family, which may be not only of a different caste from his own, but also different in race and religion." We are of opinion that, in the circumstances of this case, the plaintiff should not be placed in actual joint possession of all the huts, but should be left to his remedy by a suit for partition.

The result is that this appeal is allowed and the decree of the Subordinate Judge discharged. The plaintiff will have a decree declaring his title to the extent of the two-thirds share of the disputed land and huts, which belonged to A and B, the original mortgagors, exclusive of the one third share of their brother C. who did not join in the mortgage transaction. The decree will also declare that the plaintiff is entitled to institute a suit for partition of the property covered by the decree. Each party will pay his own costs throughout the litigation.

A. T. M.

Appeal allowed.

(1) (1853) Beng. S. D. A. 763.

(2) (1857) Beng. S. D. A. 1585.

(3) (1865) B. L. R. Sup. 172; 2 W. R. Mis. 30.

(4) (1867) 8 W. R. 239.

(5) (1870) 13 W. R. 74.

(6) (1883) I. L. R. 10 Calc. 244.

(7) (1874) 22 W. R. 214.

(8) (1878) I. L. R. 2 Bom. 676.

(9) (1881) I. L. R. 5 Bom. 499 (504).

CIVIL RULE.

*Before Sir Lancelot Sanderson, Knight, Chief Justice and Sir
Asutosh Mookerjee, Knight, Judge.*

ADWAITA CHARAN CHAUDHURI

v.

SAROJRANJAN CHAUDHURI.*

CIVIL.

1916.

May, 3.

*Judge on leave—Judgment, delivery of—Difference—Reference—Civil Procedure
Code, (Act V of 1908) section 98—Appeal—Letters Patent, clause 15.*

An appeal was heard by a Bench of two Judges, one of whom subsequently went on temporary leave; while he was so away from Court, his judgment signed by him was read out by his colleague who delivered at the same time a separate dissenting judgment:

Held, that the judgments were valid in law and an appeal lay therefrom under clause 15 of the Letters Patent.

A reference to a third Judge under Sec. 98 of the Code of Civil Procedure can be made only when the point of law on which the Judges have disagreed has been stated by both the Judges for purposes of the reference.

Application by the Respondent.

The facts material for the purposes of this report are as follows. The appeal was heard by Doss and Richardson JJ. on the 17th and 18th March 1909 when judgment was reserved. Mr. Justice Doss went on leave on the 24th May, 1909, and did not rejoin till 1st September, 1909. He continued to be a member of the Court till the date of his retirement which took place on the 13th October, 1910. On the 30th June, 1909, while Mr. Justice Doss was on leave, Mr. Justice Richardson read out in open Court the judgment prepared and signed by Mr. Justice Doss as also the judgment prepared by himself. The two judgments were not concurrent. By the judgment of Mr. Justice Doss the appeal was dismissed with costs, while by that of Mr. Justice Richardson the appeal was allowed without costs. After delivering judgment, Mr. Justice Richardson appended the following note: "As regards Appeal No. 84 of 1908, I have the misfortune to differ with great respect from my learned brother on a point of law. In his absence, I direct that the appeal be laid before the Hon'ble the Chief Justice for the purpose of being referred to a third Judge." On the 13th January, 1910, Mr. Justice Doss added the following note: "I agree that Appeal from Original Decree No. 84 of 1908 should be referred to

* Civil Rule No. 1834 of 1916 in the matter of Appeal from Original Decree No. 84 of 1908 against the decree of the Subordinate Judge of Midnapur, dated the 17th February, 1908.

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a third Judge. Let this appeal be laid before the Hon'ble the Chief Justice for orders." The matter was laid before Sir Lawrence Jenkins, C. J. who did not appoint a third Judge. Thereafter, the vakil for the appellant Babu Joy Gopal Ghosha and the vakil for the respondent Babu Debendra Nath Ghose both died. In March, 1916 the respondent applied to the Court for direction and prayed that either the case might be referred to a third Judge or that leave might be granted to rehear the appeal, as if it had never been heard or that a decree might be drawn up dismissing the appeal under section 98 of the Civil Procedure Code. The application was heard on notice in the presence of both parties.

Babu Mohini Mohan Chatterjee for the Opposite party.—The appeal should be referred to a third Judge under section 98 C. P. C.

[Mookerjee, J. : A point of law in an appeal can be referred to a third Judge, only if such a request is made by both the members of the Bench. Richardson, J. alone was not competent to make the reference, and though Doss, J. subsequently agreed with him, he did not amend his judgment by which the appeal had been dismissed with costs. Besides, the Judges did not state the point of law upon which they differed, as required by section 98 of the Code.]

If a reference to a third judge is impossible, I ask for leave to prefer an appeal from the judgment of Mr. Justice Doss under Cl. 15 of the Letters Patent.

[Sanderson C. J. : Is there any time limit within which such appeal has to be preferred.]

The time prescribed by the Rules of Court is 30 days, but the Court has power to extend the time. I contend that the uncertainty in which the matter has been involved by reason of no laches on the part of my client, is a good reason for extension of time.

Babu Satharipati Roy for the Petitioner.—I contend that no appeal can be preferred under the Letters Patent, as there is no valid judgment by Mr. Justice Doss. Mr. Justice Doss was on leave when his judgment was read out by Mr. Justice Richardson.

[*Babu Mohini Mohan Chatterjee* referred to O. 20, R. 2, C. P. C.]

[Sanderson C. J. : How can that assist you? That Rule refers to a case where a judgment written by a Judge but not pronounced by him is pronounced by his successor.]

Reference was then made to the cases of *Mahomed Akil v. Asadun-nissa Bibee* (1); *Mussamut Parbutty v. Mussamut Higgin* (2); *Sundar Kuar v. Chandreshwar Prasad Narain Singh* (3);

(1) (1857) 9 W. R. 1 (F. B.)

(2) (1872) 17 W. R. 475.

(3) (1907) I. L. R. 34 Cal. 293.

CIVIL.

1915.

Adwaita

v.

Saroj.

Satyendra Nath Roy Chowdhury v. Kastura Kumari Ghatwalin (1) ;
Girjashankar Narsiram v. Gopalji Gulabbhai (2).

[Sanderson C. J. : None of these cases is in point. In the case before the Full Bench, the judgments had been prepared by Judges of whom one died and two others retired from the Court before the time came for delivering the judgments.]

That I submit makes no difference in principle.

[Mookerjee, J :—Suppose the judgments in this case had been actually delivered on the 1st September, 1909 after Mr. Justice Doss had returned to the Court. He continued to be a member of the Court till 13th October, 1910. Why should not the judgments have the same effect as if they had been delivered on some date between the 1st September, 1909 and 13th October, 1910].

My answer is that they were actually delivered on the 30th June, 1909 when Mr. Justice Doss was not a member of the Court.

[Mookerjee, J : If you had taken objection, the delivery of judgment might have been postponed till the return of Mr. Justice Doss from leave, or, if the judgments as delivered were of no legal effect, they might have been re-delivered and signed afresh after the return of Mr. Justice Doss.]

[Sanderson C. J. : What course do you say, should now be adopted ? Do you contend that the appeal must be re-heard ?]

The appeal has been heard and cannot be re-heard.

[Mookerjee, J : If your contention is correct, the appeal is still an undisposed of appeal on the files of this Court and must be heard and disposed of.]

The judgment of the Court was delivered by

Sanderson, C. J.—We think in this case that the matter is of some hardship to the parties. Speaking for myself, I think that the judgment which was delivered by Mr. Justice Richardson on behalf of Mr. Justice Doss, when he read out the written and signed judgment of Mr. Justice Doss, was a good judgment : consequently, the only course open to the defendant is to prefer an appeal under section 15 of the Letters Patent. Of course, he will be now entirely out of time, but having regard to the unusual circumstances of this case, he ought to have the time extended ; and, we give him such time as is reasonable for preferring the appeal, and that will be one month from this date.

The notice of the Letters Patent Appeal may be served on the vakil for the respondents as prayed.

S. C. R. C.

Leave to appeal granted.

(1) (1908) I. L. R. 15 Cal. 756 (F. B.) ; 7 C. L. J. 666 (F. B.)

(2) (1905) I. L. R. 30 Bom. 241.

May, 3.

APPELLATE CRIMINAL.

Before Sir Ashutosh Mookerjee, Knight, Judge and Mr. Justice Sheepshanks.

LAKHIMI RAM GAGOI

v.

KING EMPEROR.*

CRIMINAL,

1916.

May, 2.

Criminal Procedure Code, (Act V of 1898) section 408—Sentences passed by Assistant Sessions Judge—Appeal, if lies to Sessions Court or to High Court.

11. App. 167-17 }
Cr. Rev. 275-17 }

Mahibuddin Ahmed v. Emperor
11. App. 167-17 }

Where an Assistant Sessions Judge passes sentences upon an accused each of which is four years or under, and they are ordered to run concurrently, the appeal from the conviction and sentence lies to the Sessions Court and not to the High Court.

Emperor v. Tulsidas (1) and Sher Muhammed v. Emperor (2) followed.

Appeal by the accused.

The appellant was convicted under sections 409 and 467, Indian Penal Code by an Assistant Sessions Judge and sentenced to rigorous imprisonment for four years under each charge, the sentences to run concurrently. The appellant presented his petition of appeal to the High Court which was placed before their Lordships with a note by the Registrar that in the case of *Somiruddin v. Emperor (3)* decided on the 26th July, 1915 this Court had under somewhat similar circumstances ruled that the appeal lay to the Sessions Judge and not to the High Court. In the case mentioned as precedent the accused had been charged with offences under sections 395 and 412, Indian Penal Code; he had been acquitted under the former section but convicted and sentenced to rigorous imprisonment for two years under the latter section. The precedent was not exactly in point.

The following order was passed by Mookerjee J. (Sheepshanks J. concurring):

In the case mentioned *Somiruddin Sonar v. Emperor (3)* the accused had been convicted of an offence under one section only of the Indian Penal Code and sentenced to imprisonment for a term of two years; it was ruled by Sharfuddin and Chapman JJ., that as

May, 2.

* Criminal Appeal (undefended) against the order and sentence of Mr. Mahibuddin Ahmed, Assistant Sessions Judge, Assam Valley Districts, dated 17th March, 1916.

(1) (1908) 11 Bom. L. R. 544.

(2) (1901) P. R. 25.

(3) (1915) Unreported.

CRIMINAL.

1916.

Lakhimi
v.

King Emperor.

the trial had been held by an Assistant Sessions Judge, the appeal lay, under section 408 of the Criminal Procedure Code to the Court of Session and not to the High Court. In the case before us, the accused has been convicted and sentenced under two sections of the Indian Penal Code; the sentences, however are directed to run concurrently. The appeal, we think, lies to the Court of Session; this view is in accord with that adopted by Chandavarkar and Heaton, JJ., in *Emperor v. Tulsidas* (1), namely, that where an Assistant Sessions Judge passes sentences upon an accused, each of which is four years or under, and they are ordered to run concurrently, the appeal from the conviction and sentence lies to the sessions Court and not to the High Court. A similar opinion had been expressed by Clark, C. J. and Maude, J. in *Sher Muhammed v. Emperor* (2).

Let the petition of appeal be returned for presentation to the proper Court.

S. C. R. C.

Appeal returned.

(1) (1908) 11 Bom. L. R. 544.

(2) (1901) P. R. 25; 3 Punjab Cr. R. 2506.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Sheepshanks.

CRIMINAL.

1916.

May, 8.

KHOHUA MORAN,

v.

KING EMPEROR.*

Criminal Procedure Code (Act V of 1898), section 35, sub-section (1), scope of—Several sentences of different kinds—How to run—Sentence defective in form.

Section 35 of the Criminal Procedure Code covers cases of the description, where one of the punishments inflicted is imprisonment, while the other is transportation. It is not restricted to cases where the several punishments are all of the same kind, that is, are all sentences of imprisonment or all sentences of transportation.

Omission to determine whether the sentences of imprisonment and transportation are to run concurrently or consecutively, makes the sentence defective in form.

Appeal by the Accused.

The accused were charged with offences under sections 302 and 324 of the Indian Penal Code.

The material facts appear from the

* Criminal Appeal No. 267 of 1916, (undefended) against the conviction and sentence by J. F. Graham Esq., Sessions Judge, Assam Valley Districts, dated the 10th February 1916.

ORDER OF THE COURT.

In this case the appellant has been convicted by the Sessions Judge, upon an unanimous verdict of the Jury, upon three charges, namely, *first*, a charge under section 302 I. P. C., for murdering Pamboo Bura, *secondly*, a charge under section 324 I. P. C., for causing hurt to Rengai Gaondura, and, *thirdly*, a charge under section 324 I.P.C., for causing hurt to Mosai. The sentence passed upon the accused is in these terms: "the Court accepting the unanimous verdict of the Jury convicts the accused Khohua Moran under section 302 I.P.C., and sentences him to transportation for life. The Court also accepting the unanimous verdict of the Jury convicts the accused under section 324 I.P.C., and sentences him, upon each of these counts, to one year's rigorous imprisonment, the sentences to run *consecutively*." The sentence is defective in form, as the Judge has omitted to determine whether the sentences of imprisonment and transportation are to run concurrently or consecutively. Sub-section (1) of section 35 Cr. P. Code, provides that when a person is convicted at one trial of two or more distinct offences, the Court may sentence him for such offences to the several punishments prescribed therefor, which such Court is competent to inflict, such punishments, when consisting of imprisonment or transportation, to commence one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently. We are of opinion that section 35 is not restricted to cases where the several punishments are all of the same kind, that is, are all sentences of imprisonment or all sentences of transportation. Notwithstanding the use of the word "or" between the terms "imprisonment" and "transportation," we think the section was intended to cover cases of the description now before us, where one of the punishments inflicted is imprisonment, while the other is transportation. If this view were not adopted, the result would follow that the Legislature had made no provision for cases of this type. We direct accordingly that the two sentences of imprisonment which the Judge has ordered to run *consecutively* and which consequently amount in substance to rigorous imprisonment for two years, should run *concurrently* with the sentence of transportation. The sentence, subject to this addition, will stand, because on an examination of the record we are satisfied that the propriety of the conviction is amply made out.

S. C. R. C.

Sentence modified.

CRIMINAL.

1916.

Khohua
v.
King Emperor.
May, 8.

CRIMINAL REFERENCE.

*Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice
Sheepshanks.*

CRIMINAL.

1916.

May, 10.

NABIN CHANDRA AICH

v.

NOAKHALI MUNICIPALITY.*

Procedure—Owner required to execute work—Bengal Municipal Act (III B. C. of 1884), sections 175, 178, 179, 202—Preliminary procedure—Failure to observe—Jurisdiction of Magistrate.

There are two distinct stages in the preliminary procedure when an owner is required to do a certain thing by the Municipal authority; there is first the initial notice under section 175 of the Bengal Municipal Act, followed by objection, if any, on the part of the person notified and there is next the explanation or notification of the order absolute, if any, made after his objection had been heard. This procedure is, by virtue of section 175 applicable in its entirety to a case under section 202.

Proceeding before a Magistrate on application under section 202, is without jurisdiction, when there is a failure to observe the essential preliminary steps due to non-compliance with provisions of sections 178 and 179.

Reference under section 438 of the Criminal Procedure Code.

The petitioner was fined under section 218 of the Bengal Municipal Act.

The material facts appear from the following

ORDER OF THE COURT.

This is a reference under section 438 Cr. P. Code by the Sessions Judge of Noakhali recommending that the conviction of the accused and the sentence passed on him under section 218 of the Bengal Municipal Act by the Sub-divisional Magistrate of Noakhali may be set aside.

The accused put up a fence and is alleged to have thereby encroached on a public drain which lies towards the east of a public road within the Noakhali Municipality. On the 20th December, 1915, the Municipality served a notice on him under section 202 requiring him to remove within 8 days the fence, which was described as an obstruction. The accused preferred an objection on the 23rd December stating that the fence put up by him was not an obstruction as the eastern part of the drain appertained to the land of an adjoining school. On that very day the Chairman passed an

* Criminal Reference No. 65 of 1916 (undefended) by S. P. Bakshi Esq., Sessions Judge, dated the 26th April, 1916 against a conviction and sentence by P. Sen Esq., Sub-divisional Officer, Noakhali, dated the 15th February, 1916.

order in the following terms : "I have seen the place. Nabin Chandra Aich (the accused) has encroached on the Municipal drain. Move District Magistrate requesting criminal prosecution against him." The petitioner was then placed on his trial and was fined Rs. 10 under section 218 of the Bengal Municipal Act by the Sub-Divisional Magistrate to whom the case was made over by the District Magistrate. The legality of this conviction is in question before us.

Part V of the Bengal Municipal Act includes sections 173—219. Section 175 prescribes the procedure to be followed in all cases where the owner or occupier of any land is required to execute any work or to do anything within a specified time. The first step is the service of the notice on the owner or occupier who is required to execute such work or to do such thing in the manner provided in sections 356 and 357. The second paragraph of section 175 sets out the substance of the contents of the notice. Section 176 allows the person on whom the notice has been served to prefer a written objection to the commissioner within a prescribed time. The second paragraph of section 176 and the first paragraph of section 177 specify the municipal authority by whom the objection is to be heard and disposed of. Section 178 then lays down that after the objection has been heard, an order shall be recorded, withdrawing, modifying or making absolute the requisition against which the objection is preferred. If the requisition is not withdrawn on the objection, the order must specify the time within which the requisition shall be carried out, which shall not be less than the shortest time which might have been mentioned in the original requisition. Section 179 next provides that such order shall be explained orally to the objector, should he be present at the office of the commissioners, or if such order cannot be so explained, notice of the order shall be served on him in the manner laid down in section 356. Then follows the very important provision in section 179 that such explanation of or service of the notice of the order shall be deemed a requisition duly made under the Act to execute the work or to do the thing required. It is consequently plain that there are two distinct stages in the preliminary procedure ; there is first the initial notice under section 175 followed by the objection, if any, on the part of the person notified and there is next the explanation or notification of the order absolute, if any, made after his objection had been heard. This procedure is, by virtue of section 175, applicable in its entirety to a case under section 202. In the case before us, as is clear from the facts already recited, there was compliance with the provisions of sections 175 and 176 but not with those of Secs. 178 and 179. Consequently there was

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a failure to observe the essential preliminary steps before an application could be made to the Magistrate under Sec. 202. The proceedings before the Magistrate was thus without jurisdiction and the conviction and sentence cannot be sustained.

We accordingly accept the recommendation of the Sessions Judge, set aside the conviction and sentence on the petitioner and direct that the fine, if paid, be refunded.

S. C. - R. C.

Conviction and sentence unsustainable.

APPELLATE CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir
Asutosh Mookerjee, Knight, Judge.*

TIRTHABASI SINGHA ROY AND ANOTHER

v.

BEPIN KRISHNA ROY AND OTHERS.*

CIVIL,

1916.

March, 14.

Second appeal—Civil Procedure Code (Act V of 1908), Sec. 100 (c)—Substantial error or defect of procedure—Deciding a case upon part only of the evidence—Commissioner's report, rejection of.

A second appeal lies against the decree of the lower appellate Court on the ground of a substantial error or defect in the procedure which may possibly have produced error or defect in the decision of the case upon the merits when it is shown that the Court has decided the case upon part only of the evidence after rejecting the commissioner's report.

Appeal by the Plaintiff.

Suit for possession.

The material facts are stated in the judgment.

Babus Dwarka Nath Chakravarti and Sarat Kumar Mitter for the Appellants.

Sir Rash Behary Ghose and Babu Basant Coomar Bose for the Respondents.

* Appeal from Appellate Decree No. 4179 of 1910, against the decree of Babu Rankim Chandra Mitra, Subordinate Judge of Burdwan, dated the 5th September, 1910, reversing that of Babu Narayan Chandra Chose, Munsifi, 2nd Court of Burdwan, dated the 29th June, 1909.

The judgments of the Court were as follows :

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Sanderson, C. J.—We are of opinion that this appeal should succeed and we think that the right order will be to direct that another local enquiry should be held : and, the short grounds for that opinion are these, that this case involved an inquiry into matters which in the ordinary course ought to be inquired into on the spot, and the Munsiff who directed the inquiry in the first instance, in my opinion, took the right course. The report of the gentleman who was appointed to make the inquiry was acted upon by the Court of first instance, but when it came to the Subordinate Judge he came to the conclusion that the report of the commissioner was an unsatisfactory one and could not be relied upon. and the learned gentleman who has argued this appeal has admitted that that report cannot be supported. Therefore, it seems to me that the right procedure was adopted in the first instance, namely, a local inquiry was directed ; but unfortunately, the report of the gentleman who held the inquiry must be taken as unsatisfactory and unreliable. Then the Subordinate Judge having rejected the material which in the ordinary course, if the inquiry had been properly held, would have been most valuable, proceeds to decide the case upon what was left. We think that this was not the proper way of dealing with the matter, and that he ought to have directed a second inquiry to be held ; and, we think that that does come within the words of section 100, clause (c) of the Civil Procedure Code, namely, "a substantial error or defect in the procedure provided by this Code or ... which may possibly have produced error or defect in the decision of the case upon the merits." We think that the course which the Subordinate Judge took in coming to a conclusion, or I may say without disrespect to him, in trying to come to a conclusion upon part only of the evidence in the case, after he had rejected the commissioner's report, was a substantial error or defect in the procedure which might possibly have produced error or defect in the decision of the case upon the merits. Therefore, we think the proper order is to remit the case to the Munsiff with the opinion from us that he ought to direct another inquiry to be held.

I ought to mention one fact that the Subordinate Judge seems to have decided the very material part of the case upon the ground which is set out in page 23 of the paper-book where he says, "The Lower Court comes to this conclusion apparently on the ground that Kis nat Kora belongs to the *malik* of Kora Proper which belongs to plaintiff." "It appears however that Kismat Kora does not belong to the *malik* of Kora Proper." Now, as far as I under-

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stand this case and the judgment of the Munsiff, it was never disputed in the Court of first instance that if the land or any part of the land belonged to Kismat Kora it belonged to the plaintiff because there was no distinction in the Court of first instance between Kismat Kora and Kora Proper. If there had been any point taken upon that in the Court of first instance, we do not know what evidence might have been led by the plaintiff with regard to that matter to show that the land, if in Kismat Kora, belonged to him. On the other hand, it might be shown the other way. Now that does seem to show that there was not only material error or defect in the procedure but a wrong decision on the part of the Subordinate Judge in deciding that the land, if it belonged to Kismat Kora did not belong to the plaintiff; as a matter of fact there had been no dispute that the land if it belonged to Kismat Kora, belonged to the plaintiff, just as much as the land belonging to Kora Proper.

The other point that was raised was a question of limitation. As I understand the judgment of the learned Judge, he has held that because it was proved that in 1900 the plaintiff was not in possession of the land which is in dispute, therefore he was barred by the statute of limitation. That does not seem to be a sound ground for deciding that the plaintiff is barred by the statute of limitation. I think this is a matter which will prove to be further inquired into in the manner I have indicated. Therefore, I think this appeal should be allowed.

Costs will abide the result.

Mookerjee, J.—I agree.

A. T. M.

Appeal allowed.

Before Mr. Justice Chitty and Mr. Justice Walsley.

RADHIKA MOHAN ROY

v.

MANMATHA NATH MITTER AND OTHERS.*

CIVIL.

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April, 6.

Cess Act (IX of 1880, B. C.) sections 42 cl. (3), 47, construction of—Kabuliat—Special contract to pay rent—Cess, arrears of—Interest.

Where by a kabuliat executed before the passing of the Bengal Tenancy Act or the Cess Act, rent was payable by the tenure-holder in three kists, and the latter undertook to pay any cesses which might be imposed by Government, and it was provided that no interest should be chargeable on arrears of rent until the end of the Bengali year :

Held that, the landlord was entitled to recover interest upon cesses from the dates on which they fell due, i.e., the dates of the kists on which the rent was payable under the kabuliat, inasmuch as the provisions of section 47 of the Cess Act cannot be subject to the special contract between the parties made in the kabuliat in the matter of rent.

Appeal by the Plaintiff.

Suit for rent and cesses with interest thereon.

Defendants were tenure-holders under the plaintiff. By a kabuliat executed in 1879 their rent was payable in three kists. They also undertook to pay any cesses which might be imposed by government. The kabuliat further provided that no interest should be chargeable on arrears of rent until the end of the Bengali year. The cess for the Assin kist became due on the 1st Kartick 1320 (corresponding to 18th October, 1913). There having been previous trouble in the matter of the acceptance of the rent, defendants informed the plaintiff landlord that they would deposit the amount in Court. The Court having remained closed from before the 18th October, 1913, it was deposited on the 1st of November, 1913, i.e., the day on which the Court re-opened. On that very day the plaintiff instituted the present suit. The point for decision was whether the landlord was entitled to recover interest on the cess due at 12½ per cent. per annum from the 18th October, 1913 to the 1st of November, 1913.

Mr. B. Chuckerbutty and Babu Jogendra Narain Mazumdar for the Appellant.

Mr. S. R. Das, Babu Tarakeswar Pal Chowdhury (for *Babu Surendra Madhub Mullick*) and *Babu Jatindra Nath Sen* for the Respondents.

* Appeal from Appellate Decree, No. 1566 of 1915, against the decision of H. P. Duval, Esq., Additional District Judge of 24 Pergannas, dated the 1st April, 1915, affirming the decision of Babu Latu Behary Basu, Subordinate Judge at Alipore, dated the 24th January, 1914.

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The judgment of the Court was as follows :—

This is an appeal by the plaintiff and relates to a sum of Rs. 2-3-6 p. interest on the cess payable for the Assin kist of 1320. Defendants are tenure-holders under the plaintiff and their rent is payable in three kists under their kabuliati which is dated 1879, before the passing of the Bengal Tenancy Act or the Cess Act. In that kabuliati they undertook to pay any cesses which might be imposed by government. The cess for the Assin kist admittedly amounts to Rs. 424-7-5 p. It became due on 1st Kartic 1320 (18th October, 1913). On that day the Courts were closed. There had been correspondence between the parties and there had also been previous trouble in the matter of the acceptance of the rent. Defendants accordingly informed the plaintiff that they would pay the amount into Court on the day the Court re-opened, which was 1st November, 1913 (15th Kartic 1320). On that day the defendants made the deposit now in question, and later on the same day the plaintiff filed his suit for rent and cesses. The question is whether the deposit should have been made with interest at $12\frac{1}{2}$ per cent. per annum for the few days which transpired between the cess becoming due and the deposit being made.

The kabuliati provided in the case of rent that no interest should be chargeable on arrears of rent until the end of the Bengali year i.e., the close of the month of Cheyt. It was argued for the defendants and has been found by the learned District Judge, that the same would apply to the cess and that no interest would be payable until the end of Cheyt; that is to say the defendants might be in arrears with their payment of cesses without penalty, until the end of the Bengali year. We do not think that this is the right reading of the provisions of the Bengal Cess Act. Section 42(3) provides, "Every holder of a rent-paying tenure and every cultivating raiyat shall pay the amount of road cess and public works cess due by him in instalments in the proportion of the instalments of rent payable in respect of the tenure or holding of such tenure-holder or raiyat." That means that in this case the cess would be paid in the same three instalments as the rent under the kabulyat. Section 47 says, "Every holder of an estate or tenure to whom any sum may be payable under the provisions of this Act may recover the same with interest at the rate of twelve and half per cent. per annum in the same manner and under the same penalties as if the same were arrears of rent due to him." For the defendants it is argued that this means that cesses are not to carry interest until the end of the year and that the provisions of section 47 must be subject to the special con-

tract between the parties made in the kabulyat. That is not how we read the section. We think that "in the same manner and under the same penalties as if the same were arrears of rent due to him" has reference only to the procedure to be adopted and the consequences to follow in the recovery of rent ; that is to say, the remedy would be by suit, the penalties would be possibly the sale of the holding or damages at 25 per cent., under section 68 of the Bengal Tenancy Act. The provisions of section 47 of the Cess Act cannot be restricted in this way by reason of the contract between the parties in the matter of rent. We are of opinion that in this case the cesses became due at the dates of the three kists in which the rent was payable under the kabuliya and that interest upon such cesses, would be recoverable under section 47 from the dates on which they fell due. At the same time in this particular case it was found that there had been for several years past trouble between the parties in the matter of granting receipts for the rent ; and the Courts have held that the defendants were justified in making the deposit in Court. If this were so, they admittedly made the deposit on the first day possible after the cess had become due. They should not, therefore, in equity, be saddled with the further payment of interest because the Court was closed and so they were unable to make the deposit earlier.

We accordingly disagree with the opinion expressed by the learned District Judge with regard to the liability to pay interest under section 47; but, in the circumstances of this case, we consider that the deposit having been made as it was on the first possible day, no interest was payable. We accordingly dismiss the appeal, but without costs.

A. N. R. C.

Appeal dismissed.

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April, 3, 4, 5, 6. *Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mukherjee, Knight, Judge.*

KALI DASSEE DASSEE AND OTHERS

v.

NOBOKUMARI DASSEE AND OTHERS.*

Specific performance—Plaintiff, what to prove—Contract for sale of land—Subsequent variation of contract—Contingent contract—Letters of administration, grant of—District Judge not consenting to alienation—Damages—Costs—Interference by appellate Court.

Two Hindu ladies executed in favour of the plaintiffs a contract of sale and undertook to execute a conveyance on receipt of the price. The plaintiffs realised that such purchase was likely to involve them in serious trouble and with a view to fortify their position they induced their vendors to apply for letters of administration in respect of the estates held by them and to obtain the sanction of the District Judge to the intended alienation under section 90 of the Probate and Administration Act. The ladies accordingly applied for letters of administration at the instance of the plaintiffs, who also supplied the funds requisite for the conduct of the proceedings. The District Judge granted letters of administration, but ultimately declined to sanction the sale to the plaintiffs on the terms arranged. On the other hand, he sanctioned a sale in favour of the defendant who offered a higher price. In a suit for specific performance of the contract and in the alternative for damages:

Held, that the original contract was by implication varied by mutual consent, when, at the instance of the intending purchasers, the vendors agreed to obtain letters of administration, and was transformed into a contingent contract. As the contingency did not happen, the plaintiffs were not entitled to claim performance of the contract.

Narain v. Aukhoy (1); and *Sarvesh v. Khetra Pal* (2) referred to.

That as there was no breach of the modified contract by the vendors, the plaintiffs were not entitled to damages.

Costs are in the discretion of the trial Judge and this discretion should not be interfered with by the appellate Court, unless good cause is shown.

Per Mukherjee J. The plaintiff must show that in seeking the performance of a contract, he does not call upon the other party to do an act which he is not lawfully competent to do.

Harnett v. Yielding (3) followed.

If Hindu ladies clothed with the character of administratrices, make alienation with the sanction of the District Judge under section 90 of the Probate and

* Appeal from Original Decree No. 52 of 1915, against the decree of Mr. Justice Imam, dated the 31st March, 1915, sitting on the Original Side of the Court.

(1) (1885) I. L. R. 12 Calc. 152.

(2) (1910) 11 C. L. J. 346.

(3) (1805) 2 Sch. and Lef. 549.

Administration Act, the alienation may not be operative precisely in the same way as a sale by order of the Court in administration proceedings and the burden will heavily be upon those that may impeach the validity of the transaction.

Sikher Chund v. Dulputty Singh (4) referred to.

Appeal by the Plaintiffs.

Suit for specific performance of contract and in the alternative for damages.

The material facts are stated in the judgment of the learned Chief Justice.

Messrs. B. C. Mitter, A. N. Chaudhuri and M. N. Kanjilal for Plaintiffs Appellants.

Sir S. P. Sinha, Messrs. N. C. Sinha and A. N. Mitter for Defendants 3 to 5 Respondents.

Messrs. B. L. Mitter and M. N. Mitter for Defendants 1 and 2 Respondents.

C. A. V.

The following judgments were delivered :

Sanderson, C. J.—This is an appeal by the plaintiffs who are the executrix and executors of the estate of one Bhuban Chandra Bhur deceased, and the claim is in respect of an agreement for sale dated the 23rd of January 1910, which was made between the first and the second defendants, and Bhuban Chunder Bhur, which related to the shares of those defendants in certain premises known as Nos. 10, 12 and 13 Darmahatta street. The defendants, other than the first and the second, who may be called the Nandi defendants, were the purchasers of the shares of the first and the second defendants in the premises, under circumstances to which I will refer later in more detail.

The claim is for specific performance, and in the alternative, damages.

The first defendant is the widow of Hari Charan Sett, and the second defendant is the widow of Sattya Charan Sett. These two men were the owners in equal shares of premises No. 10, and between them they owned a share in Nos. 12 and 13, which is said to have been about $\frac{1}{4}$ ths. In 1907 Hari Charan Sett died intestate, and the first defendant, his widow, is his heiress. In 1908, Sattya Charan Sett died, leaving behind him his widow, the second defendant, and his son Panchanon Sett who shortly afterwards died while an infant, and therefore the mother, the second defendant, succeeded to the estate of her late husband.

(4) (1879) I. L. R. 5 Cal. 363; 5 C. L. R. 374.

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It appears that Bhuban Chunder Bhur and the Nandi defendants were rival traders carrying on their business in different parts of the premises in question which were leased to them and it appears that when the property came into the market, Bhuban Chunder Bhur and his sons negotiated the transactions to which I shall make reference directly. Both the plaintiffs and the Nandis were anxious to buy the premises. Bhuban Chunder Bhur got into communication with the first and the second defendants through two men who are called Gajendra Kundu and Tulsi Charan Kundu who had been acting as agents for the first and the second defendants for the purpose of collecting rents of their property: and, it appears that on the 11th of January 1910, the draft agreement was settled. Then arose a question about an agreement which, it was alleged, the two deceased men, Hari Charan Sett and Satya Charan Sett, had entered into with a man called Ram Lal Pachasia, with regard to the lease of these premises, and it was stated that the ladies desired some provision being inserted in the agreement with reference to this matter. It was discussed and the decision was postponed until the date which apparently had been fixed for the completion of the contract, namely, the 23rd of January 1910. Before I deal with the agreement of the 23rd of January 1910, it is necessary for me to refer to one or two other dates: On the 15th January, four days after the draft agreement had been settled or partially settled, a contract was made between the Nundis and a lady whose name was Barodamoyi and who owned $\frac{1}{4}$ th share of Nos. 12 and 13; and, by that agreement the Nundis agreed to buy the $\frac{1}{4}$ th share of Barodamoyi, and the price which was agreed worked out at about Rs. 9000 per cottah. On the 23rd January, as I have already mentioned, the agreement in question was executed. I shall have to refer to the terms of it directly. On the 5th of February the conveyance of the share of Barodamoyi to the Nandi was executed. In the meantime, on the 2nd of February, another contract had been entered into by the Nandis with a lady called Aghoremoni who alleged that she was the owner of $\frac{1}{4}$ th share of premises Nos. 12 and 13. It is perhaps right to remark in passing that the plaintiffs alleged that this lady had no share in the property. But I do not think that it is material to consider whether that allegation was made out or not. On the 7th of February, the conveyance in pursuance of the contract of the 2nd of February by Aghoremoni to the Nandis was executed. On the 5th of February a suit was instituted by Ram Lal Pachasia against the first and the second defendants, claiming specific performance of his agreement

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with the two deceased men for a lease of the premises. On the 7th of February an event occurred which had material effect upon the subsequent history of this case. On that date a suit was brought by Nagendra Nath Samanta who was the son-in-law of the first defendant, on behalf of three infant daughters of the first defendant against the first defendant to restrain her from making an absolute alienation of the premises, alleging that first of all there was no legal necessity for her to sell the property, and secondly, that the price which was mentioned in the contract of the 23rd of January 1910 was a gross undervalue; and, on the same date a letter was written (to be found at page 64 of the paperbook) by Messrs. Fox and Mandal, solicitors acting on behalf of the plaintiff in that suit to Bhuban Chunder Bhur to this effect:

"We are instructed by Babu Nagendra Nath Samanta to inform you that he has today filed a suit in the High Court as the next friend of Srimutti Sabitri Dassi and others infant daughters of Hari Charan Sett deceased against Sreemutty Nabakumari Dassi widow of the said Hari Charan Sett deceased for an injunction restraining her from making an absolute alienation of the premises Nos. 10, 12 and 13 Durmahatta Street, Calcutta for a declaration that there being no legal necessity the defendant Srimutty Nabakumari Dassi is not entitled to convey an absolute interest in the said premises and other reliefs.

"Our client is informed that you are negotiating for the purchase of a share in the said premises from the said Srimutty Nabakumari Dassi. We are instructed to warn you against purchasing the said share and to give you notice which we hereby do that there is no legal necessity for the said proposed sale and that our clients dispute the *bona fides* thereof." This suit and the notice of the suit raised a difficulty as between Bhur and the defendants Nos. 1 and 2, the widows: and, for this reason, that as is well known, a widow cannot alienate absolutely the whole of the property unless it can be shown that there is what is called legal necessity for the alienation, and as was pointed out by the learned Advocate-General in the course of his argument, that this question can be raised either at the time by the person who is interested in the estate, by bringing an action claiming a declaration that there is no legal necessity and getting an injunction, or it may be raised after the death of the widow by the reversioner alleging that the widow had a mere right to alienate her life estate and that there was no legal necessity which would justify her alienating the entire interest in the property. Consequently a purchaser from a widow runs a very considerable risk, and it is

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obvious that in some cases he may be called upon to prove the existence of legal or justified necessity at a time when it may be exceedingly difficult and perhaps impossible for the purchaser to bring forward the necessary evidence. On the other hand, if the widow could be persuaded to take out Letters of Administration and get herself appointed administratrix and obtain leave of the Court to alienate, then of course the property would vest in the administratrix, and the purchaser would get very much better title or much more reliable title than he would have if he bought from the widow under the circumstances and with the risk to which I have just referred.

In consequence of this 'Golmal', as it was called in the evidence, which as I understand means trouble or difficulty, the sons of Bhuban Chunder Bhur who were looking after the business on behalf of their father, were advised by their attorney to ask the ladies to take out Letters of Administration, and I think it is desirable for me to refer to the evidence upon that point, which is very short and is contained in a few pages.

At page 183 of the paperbook one of the sons said, "He" (that is, his attorney) "said, as the 'Golmal' was raised, it was better to ask the ladies to take out Letters of Administration. He said nothing else. I asked the ladies to take out Letters of Administration. On Tulsi and Gajen calling at my shop, I told them to ask the ladies to take out Letters of Administration. Gajen and Tulsi said three or four days after that occasion, 'Yes', 'the ladies are willing to take out Letters of Administration, but they have no money,' and asked me to advance money to meet the expenses for taking out Letters of Administration, and the money so advanced would be deducted from the consideration when the purchase would be completed." At page 189, when the same witness was being cross-examined by Mr. Sircar, a question was put in as follows :—

Q.—I believe it is your case that the defendants Nos. 1 and 2, through Gajen and Tulsi, agreed that they would take out Letters of Administration and obtain leave of the District Judge to sell and convey the property to you ?

A.—After the 7th February after the letter of Norendra Samanta, these things were discussed.

Question repeated.

A.—Yes.

Q.—You understood that the sanction of the District Judge would be required for sale by the ladies after Letters of Administration had been taken out ?

(I think this is rather an important passage.)

"A.—On receipt of the letter dated 7th February 1910, I understood that.

Q.—You understood that the sale to your father by the ladies was conditional on the sanction of the District Judge ?

A.—There was no such condition.

Q.—Did you understand that the ladies would convey the properties to you on taking out Letters of Administration, even if the District Judge refused sanction to sell ?

A.—I did not understand that."

Then at page 190, the same witness says.

"On that day my brother-in-law got all the title-deeds. There was no need for my waiting for the title-deeds. Narendra Nath Samanta took out an injunction from the High Court and I got a letter to that effect. Thereupon I told the ladies that as there was all this 'Golmal,' I could not take the properties unless the ladies took out Letters of Administration." And then he gave a further answer to the Court, "I said I would not take the properties unless the ladies took out Letters of Administration—I would bring a suit to enforce the agreement." I think what he meant there was that he was under the impression that the agreement of the 23rd of January 1910 gave his father a right to call upon the ladies to take out Letters of Administration. There is some evidence to which I will refer shortly that the attorney had advised him to that effect.

At page 205 the other brother gives evidence: He says, "On receipt of the letter dated 7th February 1910 we were advised by our attorney to ask the ladies to take out Letters of Administration.

Q.—There was no difficulty in getting a conveyance from the ladies as widows and not as administratrices ?

A.—As Norendra obtained an injunction against them our attorney's advice for our additional safety was to take the conveyance after Letters of Administration with leave to sell was obtained. By reason of our attorney's advice we waited for the Letters of Administration and the order to sell. It was our idea after the 7th February. I was waiting all these months, because after the 7th February I understood that the order of the Judge to sell was necessary. This was the only reason why I was waiting from the 23rd January to August." Then at page 161 is to be found the evidence of the attorney: He says, "I subsequently ascertained that they had asked the defendants Nos. 1 and 2 to take out Letters of Administration. They told me that the defendants Nos. 1 and 2 were agree-

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able to take out Letters of Administration, but the defendants Nos. 1 and 2 desired they, the Bhors, should furnish them with funds and deduct the same from the purchase money to which the plaintiff has agreed. I saw Mritunjoy and Bhola in the middle of March. They told us that Gajen and Tulsī had told them that the Nundy defendants were trying to get hold of these properties, that Norendra Nath Samanta was instructed at the instigation of the Nundy defendants, that the Nundy defendants were defraying the expenses of the suit, and so I advised them to advertise the fact of the agreement and I also sent a letter from our office giving notice of the agreement to the Nundy defendants." Then at page 167, he says "My brother Kalimohan (that is, the attorney) suggested that Letters of Administration should be taken out by the ladies. I was then present. Before the receipt of the letters of the 7th February, there was no suggestion by any body as to taking out Letters of Administration by the ladies. After the receipt of the letters of 7th February, I had a discussion with my brother. My brother (that is, the attorney) suggested that Letters of Administration should be taken for greater safety.

Q.—May I take it that you consider that the conveyance by a lady on the allegation of legal necessity was less safe ?

A.—No. As all those disputes had arisen, we advised them for greater safety that the ladies should take out Letters of Administration.

Q.—What disputes ?

A.—There was a suit filed by Norendra.

Q.—Because somebody was disputing the existence of legal necessity, the taking out of Letters of Administration would be safer ?

A.—No, but because there would be difficulty owing to the change of circumstances of procuring witnesses.

The conveyance by an administratrix would dispense with the question of legal necessity. As a matter of fact the two ladies got Letters of Administration at the instance of my client. My clients advanced the money and my clients were aware all along what was going on in the Letters of Administration proceedings. As an attorney of the case I went through the papers in connection with the cases Nos. 15 and 16 of the Hooghly Court." There is only one other passage at page 170, to which I need refer :

"Q.—Was it any time agreed between Bhuban and the ladies, or any of them, that the ladies should take out Letters of Administration and then convey the property to Bhuban ?

A.—I was informed to that effect by the plaintiff.

Q.—Was the agreement between Bhuban and the ladies in writing ?

A.—There was no writing to that effect.

Q.—Was it a verbal agreement ?

A.—We told the plaintiff to tell the ladies to take out Letters of Administration with leave to sell and this was in pursuance of a clause of the agreement that the ladies would conform to any requisition that may be necessary to complete the title.

Q.—Is it your evidence that whatever agreement there was for taking out Letters of Administration, it was in that agreement by virtue of that clause ?

A.—Yes.

Beyond that clause there was no other agreement written or oral, for taking out Letters of Administration. But pursuant to that clause we asked the ladies, and they agreed, to take out Letters of Administration."

This is all the evidence upon that point.

Now, the learned Judge on that point has found this, (page 378). "The idea of applying for Letters of Administration was not present in the mind of any of the parties at the time of the agreement, and it did not occur to any of them till they came to know of Sabitri's suit wherein legal necessity was challenged". There the learned Judge was perfectly justified in coming to that conclusion on the evidence—"I cannot hold that applying for Letters of Administration came within 'rectifying and clearing the title deeds.'" The clause in the agreement to which the learned Judge was referring is to be found at page 27, and runs thus :

"The time for (your) purchasing our said share shall be a period of one month from the date of your attorney approving of the title-deeds. We shall at our own expenses do everything which your attorney shall consider necessary *for rectifying and clearing the title-deeds.*" I agree with the learned Judge that this question of taking out Letters of Administration was never contemplated by the parties at the time they made this agreement : In my opinion, the learned Judge was also right in coming to the conclusion that taking out Letters of Administration would not come within the phrase "do everything which your attorney shall consider necessary for rectifying and clearing the title deeds." There undoubtedly was an agreement between the parties that the ladies should apply for Letters of Administration. It was to the effect that the ladies should take out Letters of Administration and that the plaintiff's father should supply the necessary funds for those pro-

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ceedings, an agreement which, in my judgment, was made for good consideration and which was binding on the parties. But whether this agreement was done in pursuance of the original contract as the attorney thought it was—and which I think it was not—or whether the application for administration proceedings was made in pursuance of an additional verbal contract—which I think it was—in either case the agreement involved an application to the Court and the obtaining of the leave of the Court to the proposed sale. Furthermore, it was done at the instance of the plaintiff's father and at his request, and by so doing, in my judgment, they subjected themselves to the risk that the Judge when he heard the application might not approve the sale for any good and valid reason which might be put forward: On that application he would have to consider several matters; amongst them, first of all, whether there was necessity for sale; secondly, whether the price which was offered by the intending purchaser was a proper price. The contract, in my judgment, was to this effect, namely that the widows were to clothe themselves with the character of administratrices; and, further, they were to obtain the leave of the Court to sell the premises in question to the plaintiffs: In other words, the contract became a conditional one—conditional upon the performance of these two matters at all events. What happened then is as follows: On the 23rd of February 1910, both the first and the second defendants applied for Letters of Administration. With regard to the proceedings by the first defendant, Nagendra Nath Samanta objected, and there were several applications and interlocutory orders given by the learned judge of the District Court, and the matter came to a climax, if I may use the word, as is shown by the proceedings at pages 134 and 135. At page 135 is a petition put in on behalf of the first defendant in which she says as follows: She first describes her share in the properties in question and says that “the price of the same has been settled with an intending purchaser at the rate of Rs. 8,000 per cottah:” and, then she goes on to say, “Mohendra Nath Samanta objected at the time of obtaining certificate and he is giving out that he can secure higher offers than the price fixed by this petitioner. It is therefore prayed that permission be granted for the sale of my own share in premises Nos. 10, 12 and 13, Darmahata Street, at such higher price as Mohendra Nath Samanta might be able to secure and failing that at the price settled by this petitioner.” Then the learned Judge passed an order of the 10th of August 1910, to the effect “Let the grantee ascertain whether the persons named by the objector are willing to pay Rs. 10,000 per cottah for the

property and report by the 18th instant." And, on the 18th of August he made the following order, "considered an application of the grantee for permission to sell the properties.....to Gopi Nath Nandi and Brothers who offer to pay Rs. 10,000 per cottah. The application is granted."

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With regard to the proceedings by defendant No. 2, the material passages may be found at pages 122, 125, 123 and 124. In that case in the first instance the application of defendant No. 2 was granted, and then a rescission of that order was obtained by defendant No. 2 on a petition which is set out at page 123. She says in her petition, "The petitioner Srimutty Nabo Kumari Nandini Dassi begs to submit.....I applied for permission to sell an 8 annas share ;"—then she describes her share, and says—"at Rs. 8,000 per cottah and your Honour's Court gave the said sanction. At present Babu Gopi Lal Nandi and brothers of Darmahatta Street, Calcutta have made an offer for purchase at Rs. 11,000 per cottah." Then after stating that this petition was verified by an affidavit, she prays that "with a view to pay off the debts of my husband's estate orders be passed for the sale of the said properties belonging to his estate to Gopi Lal Nandy and Brothers at Rs. 11,000 per cottah instead of Rs. 8000, per cottah." Therefore, the result was that in each case, I mean in each of the administration proceedings by defendants Nos. 1 and 2, leave of Court was given to the proposed sale to the Nandis, and the consent of the Court to the proposed sale to Bhuban Chandra Bhur was not obtained. I am not sure that it is at all necessary to deal with the allegation which is put forward by the learned counsel for the appellants, that the defendants did not really bring all the facts relating to the transaction to the notice of the Court, but if it is necessary for me to consider that, I am not satisfied that they did conceal the facts. I have gone carefully through the different orders and the statements which were made in the different applications, and I am not satisfied that the applicants to the District Court failed to disclose the material facts relating to the matter. In any event, there is no doubt that the order of that Court stands. This is not an appeal from the order of that Court, and under that order as I have already mentioned, consent of the Court was given to the sale to the Nundis and it was not obtained by the two administratrices for sale to Bhuban Chunder Bhur.

The first question I have to consider on these facts is whether the plaintiffs can obtain a decree for specific performance of the

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contract against the first two defendants. In my opinion, the plaintiffs cannot succeed in obtaining this decree.

The case which was referred to by the learned Advocate-General, *Narain Pattra v. Aukhoy Narain Manna* (1) was to this effect : A certificated guardian of certain minors entered into an agreement with the plaintiff to sell certain land belonging to them for a fixed price contingent upon the leave of the Court, which was necessary, being obtained to the transaction, and a portion of the purchase money was paid by the plaintiff. The Court sanctioned the sale but at a higher price than that agreed on between the plaintiff and the guardian, and the latter sold to a third party. The plaintiff, thereupon, sued the minors by their guardian as next friend and the third party for specific performance of the agreement to sell to him at the price mentioned in the agreement :—It was held that “the contract was not one which could be specifically enforced, and that section 26 of the Specific Relief Act did not apply. The contract as it stood was never a complete contract at any time as it was contingent upon the permission of the Court, and the permission of the Court did not extend to the whole contract as agreed upon between the parties.” Having held, as I have, that there was a verbal agreement subsequent to the execution of the agreement of the 23rd of January 1910, which constituted an agreement between the parties a conditional one, dependent upon the consent of the Court being obtained to the sale, I am of opinion that this case is governed by the principle laid down in the case to which I have just referred. Therefore, specific performance against defendants Nos. 1 and 2 cannot be obtained. Consequently, if the plaintiffs are not entitled to specific performance against defendants Nos. 1 and 2, it follows naturally and as a matter of course that they cannot obtain it against the Nundi defendants. Therefore, the question of notice to the Nundi defendants of the contract of the 23rd of January 1910 does not arise. As regards these defendants, there can be no claim for damages, as they were not parties to the contract.

Therefore, as against the Nundy defendants this appeal must be dismissed with costs.

As regards the claim for damages, which must be confined to defendants Nos. 1 and 2, here again, having decided that the agreement was varied by the consent of the parties and became conditional on the ladies changing their character and becoming administratrices to the estates, and getting leave of the Court, that would bar the plaintiff's claim for damages, because it must be pointed out

(1) (1885) I. L. R. 12 Calc. 152.

that this action is not based upon the conditional contract, but it is based upon the original contract of the 23rd of January 1910 unvaried, and the breach is specified in paragraph 19 of the plaint. That alone would be a sufficient answer to the plaintiff's claim for damages. But I would like to add that even if the administration proceedings are to be considered as taken under the clause of the contract to which I have referred—though as I have already pointed out I do not think they can have been the administration proceedings were taken at the instance of the plaintiffs, and it was at the instance of the plaintiff that the matter was made subject to an application being made and the sanction of the Court to sell being obtained; and, such a condition involved the risk that a higher offer might be forthcoming, which, if made, the administratrix would be bound to bring to the notice of the Court, and which the Court in the interests of all the parties concerned would have to consider as against the price which was mentioned in the original agreement of the 23rd of January. It is also to be noticed that in the Court below no attempt was made to prove the damages which were stated in the plaint to be Rs. 20,000.

For these reasons in my judgment, the plaintiffs are not entitled to damages against defendants Nos. 1 and 2.

As regards the question of costs, that is a matter for the discretion of the learned Judge. I am not sure that if I had been sitting as a Judge of first instance, I should have made quite the same order as to costs as the learned Judge did. But that is not the question. Costs are in the discretion of the learned Judge, and the question I have to consider is whether I am satisfied that sufficiently good cause has been shown for me to interfere with the discretion which the learned Judge has exercised. I am not so satisfied: I bear in mind that the learned Judge must have had all the facts before him at the time he made the order. Not only that: this question of costs was expressly raised and argued before him, and especially the question of the reserved costs of the commission was strenuously argued, as I was informed, by the parties before him: and, under those circumstances I cannot go so far as to say that I am satisfied that this Court ought to interfere with the discretion which the learned Judge has exercised. I am, therefore, of opinion that this appeal ought to be dismissed with costs.

Woodroffe, J.—I am not satisfied that the ladies understood the consequence of, and were bound by the alleged agreement of the 23rd January, 1910. It is to be observed that the document was said to have been explained by the attorney of the purchaser. It

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apparently did not occur to him in dealing with the *pardanashin* ladies who were said to be selling their property to recommend that they should be represented by a separate solicitor. There was a solicitor of the estate Mr. Srimani who had been the deceased's solicitor ; and he was not consulted. It was apparently not explained to the ladies that in the event of Marwari Pachasia getting a decree for damages the ladies would in that case have been liable therefor. Nor was it explained to them that, as contended in the trial, the provision as to clearing the title might be relied upon for the purpose of showing that there was a duty upon them to get out Letters of Administration to the estate and to incur the additional costs of such administration.

But if the ladies were at one time bound by that agreement it was in my opinion superseded by another according to which the sale was to be not by the widows but by administratrices contingent on the Court's sanction being obtained. There can be under the circumstances no decree for specific performance as claimed either against the first or second defendant or the Nundi defendants. Nor as against these latter defendants any question of notice arises.

Then as regards the damages, they are claimed against the first and second defendants only. It is sufficient to say that the claim has been made in the plaint on the basis of the agreement of the 23rd January 1910 which I hold has gone. I may further add with reference to the contention that the first and second defendants were bound to do all they could to get sanction from the Court that the grant of letters of administration altered the character of the vendors ; and that the case of the plaintiffs is that Rs. 8,000 per *cottah* was the proper price of the premises. So according to them there was no loss except the alleged hypothetical loss said to be due to an alleged disturbance of their business ; with regard to which there is nothing on the record to show that it is not too remote if it be held to exist at all of which there is no evidence.

As regards the question of costs it is true that the plaintiffs succeeded in certain points in the first Court. But the learned Judge though asked to take this into account in his order for costs has not done so. Apart from the findings above mentioned in my judgment I do not think that sufficient ground has been made out for interfering with the discretion of the Court in this respect.

I therefore agree with the order proposed by the learned Chief Justice.

Mookerjee, J.—I agree that the decree made by Mr. Justice Inam is substantially correct and should not be disturbed.

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The facts material for the determination of the questions raised before us, as I gather them from the evidence, may be very briefly stated. The subject matter of the litigation is house property in this city which was owned at one time by Hari Charan Set and Panchanon Set. The share of the former devolved upon his death on his widow, the first defendant, while the share of the latter passed on his death to his mother, the second defendant. The proprietors died heavily indebted, and the ladies found it necessary to sell the disputed land to liquidate the debts. The Bhurs, the plaintiffs in this suit, as also the Nandis who form the last three defendants in this litigation, were in occupation of different portions of the property as tenants. They were rival traders and carried on business in hardware on the premises; they were consequently both naturally anxious to acquire the property. As the result of negotiations, on the 23rd January 1910, the first two defendants executed in favour of the Bhurs a contract of sale and undertook to execute a conveyance on receipt of the price which was fixed at Rs. 8,000 per cottah. Immediately after this, on the 7th February 1910, a suit was instituted against the first defendant, on behalf of her infant daughters, (who were the reversionary heirs to the estate of her husband), to restrain her from making an absolute alienation of the premises. The claim was founded on the assertion that there was no legal necessity for the alienation and that the price fixed was wholly inadequate. The plaintiffs realised that a purchase of the premises in these circumstances was likely to involve them in serious trouble, and, with a view to fortify their position, they induced their vendors to apply for letters of administration in respect of the estates held by them and to obtain the sanction of the District Judge to the intended alienation under section 90 of the Probate and Administration Act. The object of this device was obvious. If the plaintiffs took a conveyance from the ladies in their character as a Hindu widow and a Hindu mother, respectively, vested with qualified powers of alienation, their title would be liable to be challenged on the death of the ladies by the then actual reversioners, and the burden would be cast upon the plaintiffs to establish the existence of justifying legal necessity. On the other hand, if the ladies were clothed with the character of administratrices and made the alienation with the sanction of the District Judge under section 90 of the Probate and Administration Act, although the sale might not be operative precisely in the same way as a sale by order of the Court in administration proceedings, yet, as pointed out by Sir Richard Garth in *Sikher Chund v. Dulputty*

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Singh (1), the burden would lie heavily upon those that might impeach the validity of the transaction. The ladies accordingly applied for letters of administration at the instance of the plaintiffs, who also supplied the funds requisite for the conduct of the proceedings. But an unforeseen difficulty arose. The District Judge granted letters of administration, but ultimately declined to sanction the sale to the plaintiffs on the terms arranged. That the District Judge knew all the circumstances and was competent to make this order is indisputable. The Nandi defendants seized this opportunity, intervened, and offered Rs. 10,000 a cottah for the property, with the result that the District Judge sanctioned a sale at the higher price. Consequently, on the 15th July and 24th August 1910 the ladies executed conveyances in favour of the Nandi defendants. On the 15th September following, the plaintiffs instituted the present suit for specific performance of the contract of the 23rd January 1910, and, in the alternative, for damages for breach of contract. In my opinion, it is perfectly plain that the plaintiffs are not entitled to a decree for specific performance of the contract on which they rely. That contract was substantially varied when, at the instance of the plaintiffs, the ladies applied for letters of administration. Both parties to the agreement must be deemed to have implied that the transaction should not be effected until after the ladies had been clothed with the character of administrators and had secured the requisite permission of the District Judge. The original contract, when so varied by mutual consent, became in substance a contingent contract. The contingency has not happened, and, consequently, the plaintiffs are not entitled to claim performance of the contract. See *Narain v. Aukhoy* (2); *Sarvesh Chandra v. Khetra Pal* (3). In these circumstances, the observation of Lord Redesdale in *Harnett v. Yielding* (4) applies: "the plaintiff must show that in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do, for if he does, a consequence is produced that quite passes the object of the Court in exercising the jurisdiction which is to do more complete justice." On behalf of the appellants, it has been argued, however, that this view may render possible an evasion of contractual obligation wherever an unscrupulous person enters into a contract and subsequently places himself under the jurisdiction of the probate Court as an administrator. There is, in

(1) (1879) I. L. R. 5 Calc. 363; 5 C. L. R. 374.

(2) (1885) I. L. R. 12 Calc. 152.

(3) (1910) 11 C. L. J. 346.

(4) (1805) 2 Sch. & Lef. 549.

my opinion, no real foundation for this apprehension. For the purposes of the present case, it is only necessary for me to hold that the original contract was by implication varied by mutual consent, when, at the instance of the intending purchasers, the vendors agreed to obtain letters of administration. In my opinion the original contract has been varied and has been transformed into a contingent contract. In the events which have happened, the plaintiffs cannot claim specific performance of that contingent contract. From this it further follows that as there has been no breach of the modified contract by the defendants, the plaintiffs are not entitled to damages. A decree has been made in their favour for refund of the earnest money and the costs of the letters of administration proceedings. No question has been raised in this Court as to the propriety of this order.

Finally we have been asked to vary the order for costs made by Mr. Justice Imam as between the plaintiffs and the first two defendants. I am not satisfied that the order is so manifestly erroneous or unjust as to call for our interference. The decree must consequently be affirmed and this appeal dismissed with costs.

Messrs. K. M. Rakshit and Co :—Attorneys for the Appellants.

Messrs. Fox and Mandal and Mr. B. Sreemany :—Attorneys for the Respondents.

A. T. M.

Appeal dismissed.

PRIVY COUNCIL.

PRESENT :—*The Lord Chancellor (Lord Buckmaster), Viscount Haldane, Sir John Edge, Mr. Ameer Ali, and Sir Lawrence Jenkins.*

SHEOPARSAN SINGH AND OTHERS

v.

RAMNANDAN PRASHAD NARAYAN SINGH AND OTHERS,

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL].

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*February 21, 22, 23
& 24, and
March 16.*

Suit, maintainability of—Specific Relief Act (I of 1877), S. 42—Declaration of reversionary interest while there is a will of a deceased Hindu—Res judicata and Hindu law—Considerations for the Court in applying the rule.

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After the death of one B, a Hindu who left him surviving two widows, defendant R. applied for probate of a will of the deceased wherein he was described as his Kartaputra. The plaintiffs opposed the application on the allegation that they were the next reversioners of the deceased. But the District Judge held that they had failed to prove their interest and ordered that probate be granted to R. Thereupon the plaintiffs brought the present suit against R. and B.'s widows for a declaration that they were the next reversioners to the estate of B. according to Hindu law, and, as such, entitled to apply for a revocation of the probate :

Held, that the plaintiffs, while the will stood, as it must stand for the purposes of the present suit, were not clothed as required by S. 42 of the Specific Relief Act, with a legal character or title to any property which would authorise them to the declaratory decree sought by them, and that the suit should be dismissed as it was misconceived and incompetent.

Ramnandan Perashad v. Sheoparsan Singh (1) reversed on this point.

Sree Narain Mitter v. Sreemutty Kishen Soondiry Dassee (2), and *Kathama Natchiar v. Dorasinga Tever* (3), referred to.

Though the rule of *res judicata* of the Code of Civil Procedure may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators, and so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.

Appeal from a judgment and decree of the High Court at Calcutta (April 19, 1910) reversing those of the Subordinate Judge of the First Court, Mozufferpur, (December 21, 1907).

The suit was brought by the appellants, who in their plaint alleged that one Bachu Singh died on November 12, 1899, that the plaintiffs were related to the deceased and were according to Hindu Law his nearest reversioners entitled to succeed to his estate after the death of his two widows, defendants 2 and 3, as he died intestate leaving him surviving no person entitled to inherit nearer than the plaintiffs, that after the death of Bachu Singh his widows succeeded him and as his heiresses enjoyed his estate, that nearly three years after the death of Bachu Singh defendant 1, Ramnandan Prashad Narayan Singh, who was the brother's son of defendant 2, in collusion with the said widows falsely propounded a will purporting to be the will of the deceased in the Court of the District Judge of Tirhut, that in that will and in the application for the letters of administration it was falsely stated that defendant 1 was the Kartaputra of the deceased, that the plaintiffs filed a caveat and on

(1) (1910) 11 C. L. J. 623.

(2) (1873) L. R. I. A. Sup. Vol. 149 (162); 11 B. L. R. 171 (187).

(3) (1875) L. R. 2 I. A. 169 (191); 15 B. L. R. 83 (98).

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the case coming on for hearing the District Judge on the 24th March 1903 held that the plaintiffs had not proved that they were the next presumptive reversioners to the estate of the deceased, nor that any of them were such presumptive reversioners, that the District Judge accordingly declined to allow the plaintiffs to appear to support their caveat and granted letters of administration with the will annexed to defendant 1, that on appeal the High Court confirmed the said order on the 8th February 1905, that as a consequence of the said order defendant 1 was in possession of the estate of the deceased, that the plaintiffs had been advised that as long as the said letters of administration were in force they had no claim to the reversionary right to the estate of the deceased, and furthermore that they could not apply for the revocation of the said letters of administration until they obtained a declaratory decree from the civil Court to the effect that they were the nearest reversioners to the deceased according to Hindu Law, and as such entitled to his estate in case of an intestacy after the death of the widows, and that the cause of action arose on the said 24th March 1903 and 8th February 1905, the dates on which the District Judge and the High Court respectively held that the plaintiffs failed to prove that they were the nearest reversioners. The plaintiffs therefore prayed for a declaration that they were the next reversioners to the estate of the said Bachu Singh according to Hindu law. By an order of the High Court the following was added to the prayer :—

“and as such are entitled to apply to the Probate Court to get the Probate or letters of administration granted to Ramnandan Singh revoked.”

The first defendant by his written statement contended that he was the Kartaputra of Bachu Singh, who adopted him as such son in 1875, and that the said will was genuine. He denied that the plaintiffs were the next reversionary heirs of the deceased, and pleaded that the suit was barred by S. 13 of the Code of Civil Procedure, 1882, and that it was not maintainable.

The Subordinate Judge decreed the suit holding *inter alia* that the suit was not barred by S. 13 of the Code of Civil Procedure, 1882, and also that it was maintainable in view of S. 42 of the Specific Relief Act for the following reasons :—

“The defendant contends that the suit is not maintainable under section 42 of the Specific Relief Act. This is a suit for a declaration only. The objection is that when a consequential relief could be claimed, a suit for a declaration is not maintainable. On behalf of the defendant it is not stated what the consequential relief would be.

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In a case like this consequential relief cannot be claimed. The plaintiffs failed, as it was held by the District Judge and the Honourable High Court, to prove that they had a *locus standi*, and so they were not allowed to oppose the granting of the Letters of Administration to the defendant. Hence they have instituted this suit for the establishment of their right to oppose the petition of the defendant. The widows are entitled to the possession until their death. So the plaintiffs could not ask for the possession and hence no consequential relief can be claimed.

The plaintiffs were not allowed to oppose the petition of the defendant No. 1 on the ground that they had no *locus standi*; they have sued for a declaration that they are nearest reversioners. Their suit is not for a declaration that they would be entitled to the property on the death of the widows. If the plaintiffs succeed in proving that they are the nearest agnates, their right to oppose will be a vested interest. Their interest is not contingent. Their interest as reversioners was in danger by the fact of the propounding of the forged will. So I find that the plaintiffs have not got to ask for any consequential relief. Hence section 42 of the Specific Relief Act is no bar to the plaintiffs' suit. The first issue is accordingly decided in favour of the plaintiffs."

On appeal the High Court (Caspersz and Chatterjee JJ.) held that the suit was barred by S. 13 of the Code and dismissed it. The learned Judges however agreed with the Subordinate Judge in holding that the suit was maintainable under S. 42 of the Specific Relief Act. On this point, see last paragraph of p. 629 and paragraph 1 of p. 630, 11 C. L. J.

For a full report of the case see *Ramnandan Pershad v. Sheoparsan Singh* (1).

The plaintiffs thereupon appealed to His Majesty in Council.

De Gruyther, K. C. and *Sir William Garth* for the Appellants : The only relief that the appellants could claim is a declaration and the suit is, therefore, not barred by section 42 of the Specific Relief Act, 1877.

No question of title to the property of the deceased was intended to be raised in the probate proceedings. The grant of the probate determines the representative title of the grantee against debtors of the deceased and persons holding property of his. It was not a judgment *in rem* and did not constitute *res judicata* in favour of the grantee : *Mirza Kurratulain Bahadur v. Peara Sahib* (2) ; *Rajah*

(1) (1910) 11 C. L. J. 623.

(2) (1905) L. R. 32 I. A. 244 ; I. L. R. 33 Calc. 116.

Run Bahadoor Singh v. Mussamut Lachoo Koer (1); *Arunmoyi Dasi v. Mohendra Nath Wadadar* (2) followed in *Jagannath Prasad Gupta v. Rangit Singh* (3); *Lalit Mohan Das v. Radha Raman Saha* (4); and *Ganesh Jagannath Dev v. Ram Chandra* (5). Section 13 of the Code of the Civil Procedure, 1882, does not cover the present case. In order to succeed on the ground of *res judicata* the respondent must show that the District Judge, who granted probate, had jurisdiction to try and decide not only the questions of relationship and adoption but also the present suit itself in which those questions are in issue: *Gokul Mandar v. Pudmanand Singh* (6).

The District Judge in the exercise of the probate jurisdiction could not have tried the questions of the pedigree and the validity of adoption raised in the present suit, which could not have been brought in the District Court: See Bengal, United Provinces and Assam Civil Courts Act (No. XII of 1887), sections 18—21. The application for probate is not a suit within the meaning of the word in section 13 of the Code of Civil Procedure, and the probate proceedings were not a suit. The question of the pedigree was not substantially in issue in those proceedings, where it was raised incidentally. Under section 15 of the Code of Civil Procedure the suit raising the question of adoption must be brought in the Court of the Subordinate Judge and not in the District Court. It is submitted that the appellant's suit is not barred by the rule of *res judicata* under section 13 of the Code of Civil Procedure. Reference was also made to the Probate and Administration Act sections 4, 50, 51, 53, 55, 56, 57, 59, 62, 64, 67, 69, 73, 76, 77, 82, 83, 86, 87 and 154.

Dunne, for the Respondents: The grant of probate is a judgment *in rem*. On entering caveat the matter became contentious and was a suit wherein issues were raised, evidence was taken and judgment delivered after a hearing. The appellants exercised their right to appeal, wherein it was decided that they were not reversionsers. The question is therefore now *res judicata*, the test being that as the matter could not be raised again in the same Court it could not be raised in another Court of concurrent jurisdiction.

[Lord Haldane referred to *Barrs v. Jackson* (7), where it was held

(1) (1884) L. R. 12 I. A. 23; I. L. R. 11, Calc. 301.

(2) (1893) I. L. R. 20 Calc. 888.

(3) (1897) I. L. R. 25 Calc. 354.

(4) (1911) 15 C. W. N. 1021.

(5) (1896) I. L. R. 21 Bom. 563.

(6) (1902) L. R. 29 I. A. 196 (202); I. L. R. 29 Calc. 707 (715).

(7) (1842) 1 Y. & C. C. C. 585.

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that the grant of letters of administration was not conclusive evidence upon the question who was the intestate's next of kin, when the question arose in the Court of Chancery in a suit for the distribution of the assets of the intestate.]

That decision was reversed on appeal in *Barrs v. Jackson* (1), which followed *Bouchier v. Taylor* (2), where it was held that the Court of Chancery was precluded from directing any issue to try that question.

(*De Gruyther* referred to *Concha v. Concha* (3) where *Bouchier v. Taylor* (2) is considered).

That case affirmed the decision in *De Mora v. Concha* (4), that the decree of the probate Court as to domicil of the testator was incidental and therefore was not conclusive *in rem* as to the domicil.

[Lord Chancellor : According to that case the scope of the probate establishes the due execution of the will and nothing else.]

The appellants are precluded from reopening the question : *Spencer v. Williams* (5); and *Beardsley v. Beardsley* (6). The question whether the appellants were *gotias* of the deceased was an essential issue in the probate proceedings where it was directly and substantially in issue. Those proceedings were a suit. The application for probate was entitled suit No. 26 of 1902. Jurisdiction in section 13 of the Code means jurisdiction of competency and not jurisdiction of local Courts as contended. The District Judge could have tried the present suit, which could have been transferred to his Court. The present suit is in substance an application to revoke the probate, and the District Judge has jurisdiction to try it, and consequently it is barred by section 13 of the Code. Reference was also made to *Rajah of Pittapur v. Sri Rajah Row Buchi Sittaya Garai* (7), and the Code of Civil Procedure, 1882, sections 12, 16 A and 42, and Probate and Administration Act, sections 53, 55, 58, 62, 69, 70-76, 82 and 83.

De Gruyther, K. C., in reply : Both Courts in India have agreed that the suit is not barred under section 42 of the Specific Relief Act, and it is the practice of the Board not to overrule such discretion : *Thakurain Jaipal Kunwar v. Bhaiya Indar Bahadur Singh* (8). As to *res judicata* the rule of English law seems to be

(1) (1845) 1 Phil. Ch. C. 582.

(2) (1776) 4 Bos. P. C. 708.

(3) (1886) L. R. 11 A. C. 541 (555).

(4) (1885) L. R. 29 Ch. D. 268.

(5) (1871) L. R. 2 P. & D. 230.

(6) (1899) L. R. 1 Q. B. 746.

(7) (1884) L. R. 12 I. A. 16 (19) ;

I. L. R. 8 Mad. 219 (226), where *Barrs*

v. Jackson is considered.

(8) (1904) L. R. 31 I. A. 67 ; I. L. R. 26 All. 238.

that the Court in which the suit is brought considers whether the Court which tried the issue in a previous suit was competent to try it. But section 13 of the Code establishes a different principle, namely, that the Court which tried the first suit must be a Court which has jurisdiction to try the second suit. Reference was made to *Flitters v. Alfrey* (1), and the Code of Civil Procedure, 1882, sections 48 and 647.

The judgment of their Lordships was delivered by

Sir Lawrence Jenkins.—This is an appeal against a decree of the High Court at Calcutta, dated the 19th April, 1910, reversing the decree of the Subordinate Judge of the First Court, Mozufferpur, dated the 21st December, 1907.

The expressed purpose of the litigation is to obtain a declaration that the plaintiffs are the next reversioners to the estate of Babu Bachu Singh according to Hindu law, and, as such, entitled to apply for a revocation of probate.

The facts may be shortly stated. On the 12th November, 1899, Bachu Singh died, leaving two widows, the defendants Mussamut Ram Rahan Kunwar and Mussamut Ram Kishori Kunwar, but no male issue. On the 22nd September, 1902, the defendant Ram Nandan Singh applied in the Court of the District Judge of Mozufferpur for probate of a writing alleged by him to be the last will of Bachu Singh. In that writing he is described as Bachu Singh's Kartaputra.

The two widows, though heiresses of the deceased Bachu Singh, did not oppose the application. Caveats, however, were lodged by three groups of persons, and the plaintiffs in this suit were the members of one of these groups. There thus arose a contention as to the grant of probate, and the proceedings thenceforth took, as nearly as might be, the form of a suit according to the provisions of the Code of Civil Procedure, in which the petitioner, Ram Nandan Singh, was the plaintiff, and the plaintiffs in this suit, with others, were the defendants. In due course issues were framed, and they raised the two material and essential questions, first whether the present plaintiffs, as persons by whom the caveat had been entered, had, as it was termed, any *locus standi* to oppose the application for probate, and secondly whether the will propounded was the genuine and duly executed will of Bachu Singh.

After evidence, oral and documentary, it was held on the first issue that the caveators had failed to prove their interest, and on

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the second issue that the will was proved. In accordance with this finding it was ordered that "probate be granted to Ram Nandan Prashad Singh, petitioner, executor."

From the order sheet it appears that Ram Nandan was held to be an executor by implication. The present plaintiffs preferred an appeal to the High Court. The appeal was heard and dismissed with costs on the 8th February, 1905. No appeal was preferred to His Majesty in Council. But on the 7th August, 1905, the present suit was instituted in the Court of the first Subordinate Judge of Mozufferpur. The plaint states the material facts, save that it erroneously alleges that letters of administration with the will attached were granted to Ram Nandan. It is then averred in paragraph 9 as follows :—

"These plaintiffs have been advised that so long as these letters of administration are in force they have no claim to the reversionary right to the estate of the deceased ; and, furthermore, that they cannot apply for the revocation of the said letters of administration until what time they obtain a declaratory decree from the civil Court to the effect that they are the nearest reversioners according to Hindu law of the deceased Bachu Singh, and therefore entitled to his estate in case of an intestacy after the death of the defendants second party."

The defendants second party were the two widows. The prayer of the plaint as originally framed was in these terms :

"that it be declared that the plaintiffs are the next reversioners to the estate of the late Babu Bachu Singh according to Hindu law."

By a subsequent and significant amendment these words were added, "and as such are entitled to apply to the probate Court to get the probate or letters of administration granted to Ram Nandan Singh revoked "

Before the hearing Mussamut Ram Rachan Kunwar died, and by an order of the 4th February, 1907, her co-widow was substituted in her place as legal representative.

On the 6th November the following issues were framed :

- 1st. Is the suit maintainable ?
- 2nd. Is the suit barred by section 13 of the Code of Civil Procedure ?
- 3rd. Is the suit bad for non-joinder of parties ?
- 4th. Is the suit barred by limitation ?
- 5th. Are the plaintiffs the nearest reversionary heirs of Rup Narayan Singh, *alias* Bachu Singh ?

6th. Is the defendant No. 1 the Kartaputra of the said Rup Narayan Singh ?

On these issues the findings of the Subordinate Judge were in the plaintiffs' favour, and by the decree it was declared that the plaintiffs were the *gotias* of and reversioners to the estate of Babu Bachu Singh. In the plaint there was no prayer as to their gotiaship.

An appeal to the High Court was preferred by Ramnandan Prashad Singh. It succeeded on the ground that the suit was barred by the rule of *res judicata*. But though the High Court held that the case was governed by section 13 of the Code of Civil Procedure, it tried the issue, which, in that view, was withdrawn from its consideration by the terms of the section.

From this decree the plaintiffs have preferred the present appeal.

The contest before their Lordships has been confined to the two issues :—

1st. Is the suit maintainable ?

2nd. Is the suit barred by section 13 of the Code of Civil Procedure ?

The first of these problems takes the more specific form of an enquiry whether in the circumstances of this case the plaintiffs are entitled to claim from the Court a mere declaratory decree of the character proposed.

The Court's power to make a declaration without more is derived from section 42 of the Specific Relief Act, and regard must therefore be had to its precise terms. It runs as follows :—

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief : Provided, that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

A plaintiff coming under this section must therefore be entitled to a legal character or to a right as to property. Can these plaintiffs predicate this of themselves ? Clearly not ; and this is, in effect, stated in the plaint, where they described themselves as entitled to Bachu Singh's estate *in case of an intestacy* after the death of the defendant widows (para 9).

But as things stand there is no intestacy : Bachu Singh's will has been affirmed in a Court exercising appropriate jurisdiction, and

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the propriety of that decision cannot in the circumstances of this case be impugned by a Court exercising any other jurisdiction.

It is not suggested that in this litigation the testamentary jurisdiction is, or can be, invoked, and yet there can be no doubt that this suit is an attempt to evade or annul the adjudication in the testamentary suit, and nothing more.

This is apparent from the plaint, from the amendment made in the High Court after Ramnandan had died, and from the very circumstances of the case.

This use of a declaratory suit illustrates forcibly the warning in *Sree Narain Mitter v. Srimutty Kishen Soondory Dassee* (1), where it was said :

"There is so much more danger in India than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."

Here, however, no question of discretion arises ; the suit fails at the very outset, for the plaintiffs, while the will stands, as stand it must for the purposes of this suit, are not clothed with a legal character or title which would authorise them to ask for the declaratory decree sought by their plaint. The suit therefore should be dismissed because it is misconceived and incompetent.

Some reference was made in the course of the argument to a reversioner's right to sue where a widow with the particular interest was committing acts of waste to the prejudice of those who might succeed to the inheritance on her death. But such a position of necessity assumes the absence of an immediate and absolute testamentary disposition.

In this connection there is an instructive comment in *Kathama Natchiar v. Dorasinga Tevar* (2), where it was said in reference to such suits :

"Suits of that kind form a very special class, and have been entertained by the Courts *ex necessitate rei*. It seems, however, to their Lordships that if such a suit as that is brought it must be brought by the reversioner with that object, and for that purpose alone, and that the question to be discussed is solely between him and the widow ; that he cannot, by bringing such a suit, get, as between him and a third party, an adjudication of title which he could not get without it."

There has been much discussion at the Bar as to the application

(1) (1873) L. R. I. A. Sup. Vol. 149 (162).

(2) (1875) L. R. 2 I. A. 169 (191).

of the plea of *res judicata* as a bar to this suit. In the view their Lordships take the case has not reached the stage at which an examination of this plea and this discussion would become relevant. But in view of the arguments addressed to them their Lordships desire to emphasise that the rule of *res judicata*, while founded on ancient precedent, is dictated by a wisdom which is for all time.

" 'It hath been well said,' declared Lord Coke, '*interest rei publice ut sit finis litium*,' otherwise great oppression might be done under colour and pretence of law." —(6 Coke, 9 A.)

Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus: "If a person though defeated at law sue again he should be answered, 'You were defeated formerly.' This is called the plea of former judgment." (See "The Mitakshara (Vyavahara)," Bk. II, Ch. i, edited by J. R. Gharpure, p. 14, and "The Mayuka," Ch. i, sec. 1, p. 11 of Mandlik's edition.)

And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.

Their Lordships have not failed to observe that Ram Nandan Prashad Singh died before the hearing in the High Court, but they refrain from pronouncing any opinion as to its legitimate consequence in this suit, for this formed no part of the discussion before them. They have dealt with this litigation, as it was presented to them, apart from the possible effect of Ram Nandan's death.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs of such of the respondents as have appeared.

T. L. Wilson & Co. :—Solicitors for the Appellants.

Greenfield and Cracknels :—Solicitors for the Respondents.

J. M. P.

Appeal dismissed.

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PRESENT :—*The Lord Chancellor (Lord Buckmaster), Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.*

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SUNA ANA ARUNACHELLAM CHETTY AND OTHERS

v.

S. R. M. RAMASWAMI CHETTY.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Probate—Will—Validity—Principles to be followed in determining validity—Trustworthy evidence of execution and sound disposing mind and suspicious circumstances.

When a will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of will that the man ought, in the opinion of the Court, to have made. Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him, and it is not for any Court to try and discover whether a will could not have been made more consonant either with reason or with justice.

Where the last page of a will had the writing inconveniently crowded above the signature of the testator and the last page but one had also at the foot of the page writing so placed as to lend colour to the suggestion that the page had been filled up after the signature had been attached, and the evidence of the doctor, who was one of the attesting witnesses, showed that he saw the will signed by the testator and that the testator was perfectly capable of understanding a business transaction and understood what he was doing at the time he executed the will :

Held, that it would be most unsafe and most undesirable to try to spell out from the peculiar form in which the document written in the vernacular appeared a hypothetical answer to the clear, distinct, and trustworthy evidence of the doctor, and that the will was a valid testamentary document.

Appeal from a decree of the High Court at Madras (September 12, 1911) reversing a decree of the District Judge of Madura (August 30, 1909).

The respondent propounded an instrument, dated the 10th November 1904, as the will of one S. A. Subramanian Chetty (deceased) and applied that probate thereof be issued to him. The appellants opposed the application. They were an alleged adopted son (the first appellant) by the testator's mother after his death, his mother, his sister, and his minor daughter. The testator's widow did not oppose the application. The District Judge found that the will was not genuine and that the testator was not of sound disposing mind at the time of the execution thereof, and dismissed the application, but the High Court reversed both those findings and granted probate of the will.

De Gruyther, K. C. and *Dube* for the Appellants, contended that the will was not genuine.

Sir Robert Finlay, K. C., and *Kenworthy Brown* for the Respondent, were not heard.

The Judgment of their Lordships was delivered by

The Lord Chancellor—Two questions are raised in this appeal the one is whether the appeal is competent to the appellants, and the other whether a will, which was executed on the 10th November, 1904, by one Subramanian Chetty, is or is not a good and valid testamentary document.

With regard to the first point, their Lordships desire to express no opinion. In the view that they take of this case its decision is not material, and their opinion must not be taken to involve an assumption that the appellants have a sufficient interest to enable them to maintain the appeal.

With regard to the other question, it is clear that the judgment of the Judge of the District Court, which was in the appellants' favour, can only be supported if the evidence of a doctor, Dr. Van Allen, be disqualified, because either it is untrustworthy owing to faulty recollection, or, if accepted, does not go far enough to establish the validity of the will. If, therefore, their Lordships considered the doctor's evidence accurate and adequate, it would be unavailing for counsel to ask the Board to examine the detailed story of the other witnesses who were called before the District Court.

Their Lordships have given careful and close attention to the evidence of Dr. Van Allen, and are clearly of opinion that reliance can safely be placed on it in all material respects, and that it does fully and sufficiently establish the validity of the will that is in dispute.

From this evidence it appears that the deceased was operated on by Dr. Van Allen on the 9th November, 1904, in the American Hospital at Madura. He was operated on for a carbuncle, but he was, and he had for some time past to the doctor's knowledge been, suffering from diabetes. On the day following the operation the doctor observed from certain symptoms that there was a prospect of the patient sinking under the shock. He accordingly, at noon on the 10th November, told him or his friends that he had better see to his affairs, and accordingly vakils were called in, who prepared the document which is in dispute. The doctor says that he saw the will signed by the testator. He says that he was with him for half an hour, during which he signed and he (the doctor) attested. The doctor also saw a man taking notes, apparently at the dictation of

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the testator, though he did not hear what passed between them, and at 9 or 10 in the evening, after the signature of the document, the deceased left the hospital in a state of great weakness, and within a few hours died.

Now the doctor's evidence is quite clear that, in his opinion, the deceased was perfectly capable of understanding a business transaction, and understood what he was doing at the time when he executed the will. He gives several reasons, the chief of which, repeated from time to time, is that he could tell by the appearance of the face and eyes of the patient; this appears to have been regarded as unsatisfactory by the District Judge, who thought that it was not a means by which the doctor could ascertain the strength and intelligence that was left to the dying man.

Their Lordships are quite unable to accept the view of the learned Judge in this matter. There are many signs by which a doctor can determine whether a man's mind is sound or no, and certainly not the least important is the character and appearance of the man's eyes and expression.

But the matter does not rest there, because the doctor says himself that he was talking to the patient throughout the day trying to cheer him up, though whether he spoke to him at the moment when his will was executed or immediately afterwards is not made plain.

Their Lordships think that the real fact that explains the judgment of the District Judge is this: When the will is examined it appears that the last page has the writing inconveniently crowded above the signature of the testator, and the last page but one has also at the foot of the page writing so placed as to lend colour to the suggestion that the page had been filled up after the signature had been attached. It goes no further than that; but upon that it appears that the learned Judge has built up a theory of a dishonest conspiracy with regard to the preparation of this will, which their Lordships are clear Dr. Van Allen's evidence completely destroys. If the view were right that this will had been written on blank pages over signatures of the testator previously obtained, it would have been quite impossible for Dr. Van Allen to have said, as he did again and again, that he saw the deceased execute the will, and it would have been equally impossible for Dr. Van Allen to have attested on the last page of the will the signature of the deceased without noticing that there was no writing whatever over it. Remembering his responsibilities, as he clearly did, as an attesting witness, he would have been quite unable if the paper was blank, to have come and said, in

the plain words which he used, that he saw the signature of the deceased attached to this document.

These are the reasons that convince their Lordships that, whatever may be the true cause of the inconvenient way in which some of this writing appears, the explanation is not and cannot be the one that the learned Judge has assigned; it would indeed be most unsafe and most undesirable in circumstances such as these to try to spell out from the peculiar form in which a document written in the vernacular appears a hypothetical answer to the clear, distinct, and trustworthy evidence of the doctor who witnessed the will.

Their Lordships only desire to add, in conclusion, this: When a will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of will that the man ought, in the opinion of the Court, to have made. Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him, and it is not for any Court to try and discover whether a will could not have been made more consonant either with reason or with justice.

Their Lordships see no reason whatever to doubt that the view that has been taken by the High Court of Judicature at Madras is correct, and they will humbly advise His Majesty that this appeal be dismissed with costs.

T. L. Wilson & Co. :—Solicitors for the Appellants.

Douglas Grant:—Attorney for the Respondent.

J. M. P.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

SHEIKH TARAP ALI AND OTHERS,

v.

KALIPADA BANDOPADHYA.*

Money rent—Kabuliat—Rent in kind—Stipulation to pay fixed sum in case of default—Enhancement—Bengal Tenancy Act (VIII of 1885), Sec. 29.

* Appeal from Appellate Decree, No. 222 of 1914, against the decision and decree passed by Babu Kamala Nath Dass, Subordinate Judge at Dacca, dated the 25th September, 1913, reversing those of Babu Rashbehary Mukerjee, Munsiff at Munshigunj, dated the 28th January, 1913.

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Where an occupancy *raiyat* held lands at a money rent of Rs. 3-4 as. per annum, and then executed a *kabuliat* by which he agreed to hold the same lands at a fixed produce rent of 12 Batuas of paddy or in lieu thereof, 12 rupees :

Held, that the *kabuliat* could not be enforced inasmuch as it violated the provisions of section 29 of the Bengal Tenancy Act.

Hassan Kuli Khan v. Nakchhadi (1) ; *Gobind v. Banarsi Prosad* (2) ; *Kishori v. Ujir* (3) ; *Ananda v. Makram Ali* (4) and *Afar v. Surja Kumar* (5) referred to.

Appeal by the Defendants.

Suit for rent.

The father of the defendants had an occupancy raiyati holding under the father of the plaintiff at a money rent of Rs. 3-4 as. per annum. The father of the plaintiff then obtained from the father of the defendants a *kabuliat* by which he agreed to hold the same lands at a fixed produce rent of 12 Batuas of paddy, and 12 rupees instead if he failed to deliver the produce. This suit for rent was brought on the basis of the aforesaid *kabuliat*. Defendants contended that the *kabuliat* could not be enforced inasmuch as it contravened the provisions of section 29 of the Bengal Tenancy Act.

The Court of first instance gave effect to the contention of the defendants and passed a decree in favour of the plaintiff at the original rate of Rs. 3-4 as. per annum. On appeal the learned Subordinate Judge reversed the decree of the 1st Court, and passed a decree at the *kabuliat* rate.

Against that decision the defendants appealed to the High Court.

Babu Rajendra Chandra Guha for the Appellants.

Babus Satis Chandra Ghosh and *Satis Chandra Bhattacharya* for the Respondent.

C. A. V.

The judgment of the Court was as follows :

April, 12.

This appeal arises out of a suit for rent in kind in terms of a *kabuliat* executed in 1305 by the father of the defendants in favour of the father of the plaintiff. It is not denied that at least from 1292 the father of the defendant had occupied the holding in question at a money rent 3 Rs. 4 as. per annum. In 1305 the father of the plaintiff obtained from the father of the defendant a *kabuliat* by

(1) (1905) I. L. R. 33 Calc. 200.

(3) (1910) I. L. R. 37 Calc. 610.

(2) (1913) 18 C. L. J. 74.

(4) (1909) 10 C. L. J. 144.

(5) (1910) 15 C. W. N. 249.

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which he agreed to hold the same lands at a fixed produce rent of 12 Batuas of paddy and 12 Rs. instead if he failed to deliver the produce. The Court of first instance held that this was a disguised violation of the provisions of section 29 of the Bengal Tenancy Act and gave a decree at the original rate of 3 Rs. 4 as. per annum. The Court of appeal below has reversed the decree of the first Court and upheld the kabuliat rate on the authority of the case of *Gobind Mandar v. Banarsi Prosad* (1). It is contended in the second appeal before us that the lower appellate Court is wrong and the case quoted has no application to the facts of this case. We think that this contention is right. It is not denied that the defendant is an occupancy raiyat and he was paying a money rent in 1305, when this new kabuliat was taken from him. Section 29 of the Bengal Tenancy Act provides that the money rent of an occupancy raiyat must not be enhanced, so as to exceed the rent previously paid by more than 2 annas in the rupee. The covenant in the kabuliat that the produce rent was not to be less on account of drought etc., and that in default the raiyat would pay 12 rupees makes it optional with the raiyat to deliver the paddy or to pay 12 rupees instead. The enforcement of the kabuliat would always have to be made in case of failure to deliver the paddy i.e., by the recovery of Rs. 12 per annum. The practical effect is that Rs. 3-4 annas is increased to Rs. 12 under the cloak of a commutation. It is found by the Court of first instance that the average price of paddy for the last twenty years has been a Batua for a rupee. So that 12 Batuas of paddy cannot be said to be the commuted form of Rs. 3-4 annas. There is therefore no change of form but enhancement under a false description. The first case that deals with the question is that of *Hassan Kuli Khan v. Nakhedi Nonia* (2). There the change was from *nugdi* into *bhaoli*: the learned Judges (Pratt and Geidt JJ.) said "The conversion related to the medium by which rent was payable; the produce would be a varying produce and in years of drought it might be very little or nothing." In the present case there is no such uncertainty and the original rent and the rent that is exigible on default are both in money. The next case that of *Gobind Mandar v. Banarsi Prosad* (1) was one in which a lease for 5 years with a cash rent provided that if the tenant held over he was to pay *Bhaoli* rent by dividing the crops equally with his landlord. There in the first place the payment of the *bhaoli* rent was agreed to be due in case the tenant held over so that the alteration in the rent was provided in the original contract. In the second place there was the

(1) (1913) 18 C. L. J. 74.

(2) (1905) I. L. R. 33 Calc. 200.

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same uncertainty of produce as in the first case and in the third place it was not the case of an occupancy holding. The next case that of *Kishori Mohan Bose v. Sheikh Ujir* (1), was that of addition to money rent by paddy rent the value of which exceeds the proportion of 2 annas in the rupee is within the mischief of section 29. So far as it goes this case seems to support the contention of the appellant. The case of *Fazl Imam v. Sukor Mahton* (2), was a case of enhancement of produce rent and has no application.

It was held in the case of *Ananda Chandra Roy v. Makram Ali* (3), that when under a kabuliati an under-raiyat was liable to pay a certain quantity of produce and in the event of failure to do so to pay a fixed amount in cash his rent is a money rent within the meaning of section 48 of the Bengal Tenancy Act. In the case of *Afar v. Surja Kumar Ghose* (4), also a similar view was taken of similar terms in a kabuliati.

We think therefore there has been a violation of the provisions of section 29 and we set aside the decree of the lower appellate Court and restore that of the trial Court with costs.

A. N. C. R.

Appeal allowed.

(1) (1910) I. L. R. 37 Calc. 610.

(2) (1913) 19 C. L. J. 333.

(3) (1909) 10 C. L. J. 144.

(4) (1910) 15 C. W. N. 249.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.

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BROJOBASI KOER

v.

RAM SANKAR DAS AND ANOTHER.*

Occupancy raiyat—Land used for grazing purposes—Landlord and Tenant Procedure Act (VIII B. C. of 1869), Sec. 6—Land covered by jungle and not brought under tillage—Raiyat cultivating for more than 12 years under a landlord having no title, status of.

A land may be used for the grazing of cattle required for agricultural pursuits, or it may be used for the grazing of cattle required for avocations totally unconnected with agriculture. In the former contingency, but not in the latter, the

* Appeal from Appellate Decree No. 759 of 1914, against the decision of Mr. P. K. Chatterjee, District Judge of Sylhet, dated the 11th December, 1913, reversing that of Babu Nogendra Kumar Bose, Munsiff of Habiganj, dated the 30th September, 1912.

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holding is used for an agricultural purpose and a right of occupancy may be acquired therein.

Hedayet Ali v. Kamalanand Singh (1) referred to. †

The mere fact that a part of the land is still covered by jungle and has not been actually brought under tillage, does not take the case out of the operation of section 6 of the Landlord and Tenant Procedure Act, which applies to land 'cultivated or held.'

A raiyat who has occupied and cultivated land for more than 12 years under a landlord who has no title to the land, acquires a right of occupancy under section 6 of Act X of 1859 or Act VIII (B. C.) of 1869.

Zolfun v. Radhicka (2); *Ameer Hossein v. Sheo Suhac* (3); and *Sheo Prokash v. Ram Sahoy* (4) referred to.

Appeal by the Plaintiff.

Suit for ejectment.

The material facts and arguments are stated in the judgment.

Babu Gopal Chandra Das for the Appellant.

Babu Hemendra Kumar Das for the Respondents.

The judgment of the Court was delivered by

May, 28.

Mookerjee, J.—This is an appeal in an action in ejectment, by the plaintiff, who holds a putni from a purchaser at a sale for arrears of revenue of the residuary share of an estate under the Assam Land and Revenue Regulation 1886, and seeks to evict the defendants as trespassers: The defendants resist the claim on a two-fold ground; namely, *first*, that the lands are included within, not the residuary estate purchased by the grantor of the plaintiff, but a separate account which has not been sold; and *secondly*, that they are, in any event, occupancy raiyats as they have been in possession as cultivators for more than twelve years. The Courts below have concurrently found that the disputed lands lie within the residuary estate; but while the trial Court held that the plaintiff was entitled to a decree for ejectment, the Subordinate Judge has taken a contrary view. On the present appeal, the decree of the lower appellate Court has been assailed substantially on two grounds: *first*, that as the land has been used for grazing purposes, the defendants are not occupancy raiyats; and *secondly*, that as the defendants claimed to hold the land under the proprietor of the separate accounts, they cannot set up a right of occupancy within the residuary estate. In our opinion, there is no foundation for either of these contentions.

(1) (1912) 17 C. L. J. 411.

[† See also *Dina Nath v. Sashi Mohan* (1915) 22 C. L. J. 219 (222), a case under the Bengal Tenancy Act.—Rep.]

(2) (1878) I. L. R. 3 Calc. 560; 1 C. L. R. 388.

(3) (1873) 19 W. R. 338.

(4) (1871) 8 B. L. R. 165 F. B; 17 W. R. 62 F. B.

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Mookerjee, J.

As regards the first ground, we observe that section 71 of the Assam Land and Revenue Regulation provides that property sold under section 70 for arrears of revenue, shall be sold free of all incumbrances previously created therein by any other person than the purchaser. But this rule is not to apply to entitle a purchaser to eject any tenant having a right of occupancy under the Rent Law for the time being in force or to enhance the rent of any such tenant, otherwise than in the manner prescribed by that law. The Rent Law in force in the district where the land is situated is contained in Act VIII of 1869 (B. C.). Section 6 provides that every raiyat who shall have cultivated or held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under pottah or not, so long as he pays the rent payable on account of the same. In the present case, it has been found that the defendants are cultivators; they are consequently raiyats within the meaning of section 6. It has also been found that they have held the entire tract for a period of more than twelve years; a portion has been used for grazing purposes, while the remainder is still covered by jungle.

The question thus arises, whether the use of the land for grazing purposes entitles the defendant to claim a right of occupancy under section 6.

The answer must be in favour of the defendants, on the principle explained in *Hedayet Ali v. Kamalanand Singh* (1), where reference is made to the earlier decisions in *Fitzpatrick v. Wallace* (2) and *Latifur Rahaman v. Forbes* (3). The true test is to determine whether the user of the land has been for agricultural purpose. The land may have been used for the grazing of cattle required for agricultural pursuits; or it may have been used for the grazing of cattle required for avocations totally unconnected with agriculture. In the former contingency, but not in the latter, the holding has been used for an agricultural purpose and a right of occupancy has been acquired therein. The mere fact that a part of the land is still covered by jungle and has not been actually brought under tillage does not take the case out of the operation of section 6, which applies to land "cultivated or held."

The first ground assigned to support the contention that a right of occupancy has not been acquired in the land cannot consequently prevail.

As regards the second ground, we find that the defendants have

(1) (1912) 17 C. L. J. 411.

(2) (1869) 11 W. R. 231.

(3) (1909) 14 C. W. N. 372.

been in occupation of the land from at least 1876. Since 1900, when the separate account was opened, the defendants have, it appears, on some occasions, paid rent to the proprietor of the separate accounts under the mistaken notion that the land was comprised in that account and not in the residuary estate. This, however, does not affect their position, because as was pointed out in *Zoolfun Bibee v. Radhicka Prosonno Chunder* (1), *Ameer Hossein v. Sheo Suhai* (2), and *Sheo Prokash Misser v. Ram Sahoy Sing* (3), a raiyat who has occupied and cultivated land for more than twelve years under a landlord who had no title to the land, nevertheless acquires a right of occupancy under section 6 of Act X of 1859 or Act VIII of 1869 B. C. Consequently the defendants have acquired the status of occupancy raiyats.

The plaintiff appellant has finally asked that a declaration may be appended to the decree to the effect that as putnidar he is entitled to realise rent from the defendants. The defendants do not object to this prayer. We direct accordingly that a declaration to this effect be added to the decree. Subject to this addition, the decree of the District Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed : Decree modified.

(1) (1878) I. L. R. 3 Calc. 560; 1 C. L. R. 388.

(2) (1873) 19 W. R. 338.

(3) (1871) 8 B. L. R. 165 F. B.; 17 W. R. 62 F. B.

Before Mr. Justice Coxe and Mr. Justice Teunon.

CHATTERPUT SINGH

v.

DAYA CHAND MARWARI.*

CIVIL.

1911.

June, 30.

Execution of Decree—Limitation, question of, to be decided by which Court—Decree of High Court—Transfer, Application of—Limitation—Indian Limitation Act (IX of 1908) Sch. I Art. 183—Revivor of Decree—Notice, issue of—Civil Procedure Code (XIV of 1882) Sec. 245 B.

* Appeal from Order No. 384 of 1909 against the order of the Subordinate Judge of Bhagalpur, dated August 6th, 1909.

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It is for the executing Court to deal with the question of limitation.

Sripathi Charan Chowdhury v. R. Belchambers (1) followed.

Limitation runs under Art 183, Sch. I of the Limitation Act from the time when the right accrues, that is to say, from the date of the decree and not from any time when the decree-holder has an existing right.

The mere fact that the High Court transmitted its decree for execution to another Court does not show that it was of opinion that the execution was not barred.

Although a judgment-debtor does not contest a notice under order 21, R. 22 of the Code of Civil Procedure, he can put in objections when his property is attached.

An application for transfer of a decree does not amount to a revivor. Nor is a notice alone under Sec. 245 B of the Civil Procedure Code, 1882, when execution is sought by arrest of the judgment-debtor, a revivor.

Appeal by the Judgment-debtor.

Application for execution of a decree of the High Court.

The material facts will appear sufficiently from the judgment.

Mr. Jackson with *Babu Lachmi Narayan Singh* for the Appellant.

Dr. Rash Behary Ghose and *Babu Manmatha Nath Mukerjee* for the Respondent.

The judgment of the Court was follows :

June, 30.

This appeal arises out of an application for the execution of a decree of this Court, dated the 3rd September, 1896. On the 3rd April, 1897, application was made for the execution of the decree by the arrest of the judgment-debtor. Notice was ordered to be issued under section 245 B of the then Code but no evidence is given to show that any other action was taken. On the 2nd March, 1909, an application was made for the transfer of the decree to Bhagalpur and this was ordered by the Registrar. On the 6th April application was made to the Bhagalpur Court to execute the decree. Notice was issued under order XXI, rule 22, and on the 6th May the following order was passed :—"Service of notice proved, no objection raised. Let attachment be issued." On the attachment being effected the judgment-debtor came in and objected that the execution was barred by limitation, and this is the sole question that arises in this appeal.

The learned Subordinate Judge held that the decree-holder had, under article 183 of the Limitation Act, 1908, twelve years from the time when he had an existing right to execute the decree, that

he had such an existing right in April 1897 and that, therefore, the suit was in time. He also held that as this Court had transferred the decree it was necessarily of opinion that execution was not barred.

The view that under article 183 the plaintiff had twelve years from any time when he still had an existing right is clearly untenable. Limitation runs from the time when the right accrues, that is to say, from the date of the decree. Nor does the fact that this Court transmitted the decree show that it was of opinion that the execution was not barred. That question was not considered, much less decided, by this Court.

The grounds, therefore, on which the decision of the Court below is based appear to us to fail. The decision, however, has been supported by the learned vakil for the respondent on three other grounds, namely, (1) that the question of limitation should have been decided by this Court, (2) that that question is concluded by the order of the 6th May and (3) that limitation is saved by the proceedings of 1897, which amounted to a revivor of the decree.

As to the first point the learned Pleader relies on the cases of *Soomut Dass v. Court of Wards* (1) and *Lootfoollah v. Keerut Chand* (2) which are, no doubt, in his favour. Those cases, however, were rulings under Act VIII of 1859 which contained no provision analogous to section 228 of the Code of 1882. And, moreover, it is difficult to reconcile them with the case of *Leak v. Daniel* (3). The case of *Jassoda Koer v. Land Mortgage Bank of India* (4) does not really lend much support to the respondent while that of *Chhotay Lal v. Puran Mull* (5) is against him. On the other hand it was held in the case of *Sripathi Charan Chowdhury v. Belchambers* (6) that it is for the executing Court to deal with the question of limitation. And in *Suja Hossein v. Monohur Das* (7) the right of the executing Court to deal with this matter seems not to have been questioned. We think that the executing Court was fully competent to deal with the question and must so decide the first point taken on the respondent's behalf.

The second point is based on the case of *Mungal Prashad Dicit v. Grija Kant Lahiri* (8). But that case is no authority for

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(1) (1874) 21 W. R. 292.

(2) (1874) 21 W. R. 330.

(3) (1868) 10 W. R. 10 (F. B.)

(4) (1881) I. L. R. 8 Calc. 916; 11 C. L. R. 348.

(5) (1895) I. L. R. 23 Calc. 39. (6) (1910) 15 C. W. N. 661.

(7) (1895) I. L. R. 22 Calc. 921.

(8) (1881) I. L. R. 8 Calc. 51; 11 C. L. R. 113; L. R. 8 I. A. 123.

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holding that if a judgment-debtor does not appear to contest a notice under order XXI, rule 22 he cannot avail himself of the provisions of the Code which authorise him to put in objections when his property is attached. In the case cited the judgment-debtor acquiesced in the order of attachment and the decision of their Lordships was in great measure based on that acquiescence.

The third point taken is wholly opposed to the decision in *Jogendra Chandra Roy v. Syam Das* (1) in which it was held that a writ of revivor is identical with a proceeding under section 248 of the Code [see also *Ashootosh Dutt v. Doorga Churn Chatterjee* (2)]. Reliance has been placed on *Beni Madho v. Shiva Narain* (3). We understand that the learned vakil does not invite us to go to the whole length of that decision and hold that an application for transfer amounts to a revivor, but it was argued that what was essential to constitute revivor was this, that where execution could not proceed without leave of the Court, the granting of that leave was a revivor of the decree. But no leave was necessary for the arrest of the judgment-debtor. Under section 254, every money-decree could be enforced by the imprisonment of the judgment-debtor. Under section 245 B the Court had powers to issue a notice first when an application for execution in this manner was filed. But it was not bound to exercise this special power, and if it did not see fit to pass any special orders in the matter, the execution would proceed in the ordinary way. Moreover, even if an order for execution after a notice under section 245 B did amount to revivor, there is nothing to show that any such order was passed. The notice alone would not be sufficient. *Sripathi Churn Chatterjee v. Belchambers* (4); *Monohur Das v. Fatteh Chand* (5); *Kamini Debi v. Aghore Nath Mukerjee* (6).

We think, therefore, that the application for execution is clearly barred by time. The appeal is allowed and the application refused with costs of both Courts which we assess at 5 gold mohurs.

D. K. R.

Appeal allowed.

(1) (1909) I. L. R. 36 Calc. 543; 9 C. L. J. 271.

(2) (1880) I. L. R. 6 Calc. 504.

(3) (1907) 4 A. L. J. 405.

(4) (1910) 15 C. W. N. 661.

(5) (1903) I. L. R. 30 Calc. 979.

(6) (1909) 11 C. L. J. 91.

FULL BENCH.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight Judge, Sir Asutosh Mookerjee, Knight, Judge, Mr. Justice Chitty and Mr. Justice N. R. Chatterjea.

CHUTTERPAT SINGH

v.

SAIT SUMARI MAL AND OTHERS.*

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1916.

*April, 26, 27.
May, 3.*

Decree, execution of—Limitation Act (IX of 1908), Sch. I. Art. 183—'Revivor'—Application for transmission of decree—Civil Procedure Code (Act XIV of 1882) Secs. 248, 249, 637—Belchamber's High Court Rules, 345, 370—Master, if can determine question under sec. 249—Judicial act—Law of limitation, applicability of, to proceeding.

Held, that upon the application for transmission of the decree under section 223 of the Code of Civil Procedure of 1882, a notice under section 248 could not properly be issued, that such notice, though issued, did not by itself operate as revivor of the decree, and that there was not in fact and could not in law be such a determination by the Master under section 249 as would operate to revive the decree.

The determination of a question under section 249 of the Code of Civil Procedure of 1882, whether a decree should or should not be executed, is a judicial act. Such judicial act cannot be delegated to a Master under section 637 of the Code of Civil Procedure, 1882.

Rules 345 and 370 of the Rules of the High Court set out in Mr. Belchamber's Rules and Orders are to be read as modified by the Civil Procedure Code of 1882.

To constitute a revivor of a decree, there must be, expressly or by implication, a determination, made with jurisdiction and by a competent tribunal, that the decree is still capable of execution and the decree-holder is entitled to enforce it.

Kamini v. Aghore (1) approved.

The substance and not the form of the matter must be looked at.

Per Sanderson, C. J., Chitty and N. Chatterjea JJ: The word 'revivor' in article 183, Sch. I of the Limitation Act does not mean the same thing as one or more of the matters which are mentioned in Art 182, sub-clauses 5 and 6.

Per Mookerjee, J: Article 183 should not be interpreted with reference to article 182, Sch. I of the Limitation Act.

Per Woodroffe, J:—An order for transmission is a ministerial act and, not a revivor.

* Full Bench Reference in Appeal from Original Civil No. 75 of 1915, against the order of Mr. Justice Chaudhuri, sitting on the Original Side, dated the 2nd August, 1915.

(1) (1909) 11 C. L. J. 91 (93).

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An order for transmission of decree as such is not an order on an application for execution though it is an order in execution. It is a proceeding taken with a view to further action by way of execution elsewhere on which action, unless previously determined, the question of the right to execute the decree is decided.

Per Woodroffe and Mookerjee JJ: An application for transmission of decree is not a revivor.

Per Mookerjee, J: The law of limitation applicable to a proceeding is, unless there is a distinct provision to the contrary, the law in force at the date of the institution of the proceeding.

Lala Sonee Ram v. Kanahi Lal (1) referred to.

An application for transfer of a decree is in no sense an application for execution.

Nilmony v. Biresur (2); *Chatterput v. Daya Chand* (3), and *Khetpal v. Tikam* (4) referred to.

The issue of a notice under section 248 of the Code of Civil Procedure of 1882, on the basis of the application for transmission of the decree, is not in conformity with the Code of 1882.

Appeal by the Judgment-debtor.

Application for execution of decree.

On the 21st May, 1896 the respondents obtained an *ex parte* decree for money against the appellant on the Original Side of the High Court. After intermediate proceedings, the decree-holders, on the 18th January, 1915, made the present application for execution of the decree by attachment of certain house in Calcutta. The judgment-debtor objected that the application was barred by limitation under article 183 of the schedule to the Indian Limitation Act, 1908, which was in force at the date of the application. The objection was over-ruled by Mr. Justice Chaudhuri. The judgment-debtor appealed. The appeal was heard before Sanderson, C. J., Woodroffe and Mookerjee JJ., who referred the case to a Full Bench by the following

ORDER OF REFERENCE.

The question we propose to refer to the decision of a Full Bench is whether the application of the 1st of June 1908, and the order of the 30th of June 1908 constitute a *Revivor* within the meaning of Article 183 of the second schedule to the Indian Limitation Act, 1908.

M^r. Jackson, (with him *Messrs. M. N. Bose* and *A. P. Bose* for the Appellant, referred to sections 223, 224, 224(c), 230, 235, 245(a), (b), 259 and *Heckle's Rules and Orders* p. 204. Referred to following

(1) (1913) L. R. 40 I. A. 74 ; I. L. R. 35 All. 227 ; 17 C. L. J. 488.

(2) (1889) I. L. R. 16 Calc. 744.

(3) (1911) 23 C. L. J. 641.

(4) (1912) I. L. R. 34 All. 396.

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cases :—*Suja v. Monohur* (1) ; *Suja v. Monohur* (2) ; *Umrao Singh v. Lachmi Narain* (3) ; *Bhabani v. Pratap* (4) ; *Nilmony v. Biressur* (5) ; *Beni Madho v. Shiva Narain* (6) ; *Monohar v. Futteh Chand* (7) ; and *Kamini v. Aghore Nath* (8) as dealing with the essence of 'revivor'. The applications for transfer are dealt with entirely apart from applications for execution. No notice should have been issued.

Sir S. P. Sinha, (with him *Messrs. B. L. Mitter* and *A. P. Sinha*) for the Respondents :

[*Sanderson, C. J.* :—Mr. Advocate-General : Is not the definition of 'revivor' given in 11 C. L. J. correct ? Is not this the correct test ?]

Yes. The definition is correct.

Order in this case decides that the decree is capable of execution.

'Revivor' includes only an order for execution. I submit that 'revivor' *re* a decree in the Original Side means the same thing as Cls. (5) and (6) of Art. 182. Deals with the history of the word 'revivor.' Art. 182 applies to mofussil Courts and Art. 183 to the Original Side of the High Court ; the two should be construed together. Referred to Act XIV of 1859, Sec. 19, Act IX of 1871, Arts. 167, 169, Act XV of 1877, Arts. 179, 180 and Act IX of 1908 Arts. 182, 183 ; *Ashoo Tush v. Doorga Churn* (9) ; Belchamber's Rules and Orders, Rule 348, pp. 192, 199, 368—370 ; *Sreenath v. Romesh* (10) ; *Futteh Narain v. Chandrabati* (11) ; *Jogendra Chandra v. Shyam Das* (12) ; *Husein v. Saju* (13) ; *Beni Madho v. Shiva Narain* (.) and *Srihary v. Murari* (14).

Mr. Jackson in reply referred to *Baijnath v. Ahmed* (15) ; *Sreepati v. Shamaldhone* (16) ; *Khetpal v. Tikhām* (17) ; *Umrao Singh v. Lachmi Narain* (3).

C. A. V.

The following judgments were delivered :

May, 8.

Sanderson, C. J.—This is an appeal by the defendant against the decision of the learned Judge, by which he refused to set aside

(1) (1896) I. L. R. 24 Calc. 244 (246).

(2) (1895) I. L. R. 22 Calc. 921 (922).

(3) (1904) I. L. R. 26 All. 361 (363).

(5) (1889) I. L. R. 16 Calc. 744 (745).

(7) (1903) I. L. R. 30 Calc. 979 (981).

(9) (1880) I. L. R. 6 Calc. 504.

(11) (1892) I. L. R. 20 Calc. 551.

(13) (1890) I. L. R. 15 Bom. 28.

(15) (1912) I. L. R. 40 Calc. 219.

(4) (1904) 8 C. W. N. 575 (576).

(6) (1907) 4 A. L. J. 405.

(8) (1909) 11 C. L. J. 91 (93).

(10) (1908) 12 C. W. N. 897.

(12) (1909) I. L. R. 36 Calc. 543 (552)

(14) (1886) I. L. R. 13 Calc. 257.

(16) (1910) 15 C. L. J. 123.

(17) (1912) I. L. R. 34 All. 396.

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an attachment effected at the instance of the plaintiff on the defendants' property 147 Cotton Street in Calcutta. The question which was referred to the decision of the Full Bench was whether the application of the 1st of June 1908 and the order of the 30th June 1908 constituted a Revivor within the meaning of Article 183 of the first schedule to the Indian Limitation Act of 1908.

The material facts and dates were as follows :—On the 21st May 1896—The plaintiff obtained a decree in the High Court for the payment of money against the defendant.

2nd September, 1896—An application was made for the transmission of a certified copy of the decree to the Purnea Court.

15th May, 1899—Application for execution by arrest and imprisonment of the defendant was made : the former application having been returned unexecuted.

12th February, 1900—An order on the last-mentioned application was made—returnable on the 12th March, 1900.

12th March, 1900—The time was extended for three months.

1st June, 1908—An application was made in the High Court for the transmission of a copy of the decree to Murshidabad for the attachment of property.

30th June, 1908—Order for transmission was made.

17th July, 1908—Copy of the decree was transmitted.

18th January, 1915—Application was made for execution by attachment of 147 Cotton Street.

10th June, 1915—Order was made for execution.

19th July, 1915—Notice of application by the defendant to set aside the attachment was issued.

2nd August, 1915—The application was heard and refused, and it is from the order of 2nd August 1915 that the defendant appealed.

The points relied upon in the court below by the defendant was that the decree of 21st May 1896, in execution whereof the attachment was made, was barred by the above mentioned statute of Limitation. On behalf of the plaintiff it was urged that by reason of the application of 15th May 1899 and the orders of 12th February 1900 and 30th June 1908 the decree was kept alive and was therefore enforceable by execution.

The clause which is applicable to this matter is Article 183 of the first schedule of Act IX of 1908. The first column describes the application as follows :—"To enforce a judgment, decree or order of any court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction, or an order of His Majesty

in Council." The second column prescribes the period of Limitation viz., 12 years. The third column specifies the time from which the period of limitation begins to run as follows, "when a right to enforce the judgment, decree or order accrues to some person capable of releasing the right." It is clear that if the matter stopped there the decree would not be enforceable, for it was made on the 21st May 1896 and the application for execution, which is now material, was not made until the 18th January, 1915. But there is a proviso contained in Article 183 which runs as follows:—Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgement or the latest of such revivors, payments or acknowledgments, as the case may be," and it is in respect of this proviso that the question which has been referred to the Full Bench arises.

It is not denied that the order which was made on the 12th February 1900 for the execution of the decree by the arrest of the defendant constituted a "revivor" within the meaning of the clause: but it is said on behalf of the defendant that more than 12 years has elapsed since such revivor and that the decree is no longer enforceable. On the other hand the plaintiff alleges that the application of the first June 1908 and the order of 30th June 1908 constituted a revivor within the meaning of the clause and consequently that the decree is still capable of being enforced, inasmuch as the application was made on the 18th January 1915, a date within the period of 12 years, counting such period from June, 1908. It is necessary, therefore, to consider in the first instance what was the nature of the application of the 1st June 1908 and the proceedings in connection therewith. The particulars of the application are shown by the entry in the last column of the form on which the application was made as follows:—

"By transmission of certified copy of the said decree together with a certificate of non-satisfaction to the court of the District Judge of Murshidabad within whose jurisdiction the defendant has property and by attachment and sale of which the plaintiff's claim may be satisfied. The defendant has no property within the jurisdiction of this Hon'ble Court whereby the decree can be satisfied."

This was obviously an application for transmission of a copy of

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the decree under sections 223 and 224 of the Civil Procedure Code of 1882, the Code which was in force at the date of the application. The particulars of the application show that it was intended to bring it with clause (b) of section 223, and the procedure which the court was asked to make use of was that provided by section 224 of the Act.

The application however was made, upon a form which was applicable to an application under section 235 of the 1882 Act which deals with an application for execution and which sets out the particulars which must be included in a tabular form which the applicant or some other person acquainted with the facts must verify.

Upon the application being made, an order was made by the Registrar that notice under section 248 should issue. Notice was thereupon served upon the defendant calling upon him to show cause why the decree should not be executed against him.

On the 30th June, 1908 the following order was made by the Registrar. "Upon reading the notice and the affidavit of service, no cause being shown, let execution issue as prayed"—and in consequence of this order a copy of the decree with a certificate on non-satisfaction was transmitted to the Murshidabad Court.

It was argued first that the order was in itself a "revivor" within the meaning of Article 183 of the schedule of the Limitation Act.

The test of what constitutes such a "revivor" is in my judgment correctly laid down by Mookerjee J. in *Kamini Debi v. Aghore Nath Mukherjee* (1) as follows:—"The essence of the matter is that to constitute a revivor of the decree there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it" and I think it must necessarily be implied that such determination must be by a Court or person duly qualified to make it.

The question therefore arises whether by the above-mentioned order there was such an express or implied determination in this case. In my judgment the substance and not the form of the matter must be looked at: and considered from that point of view the application was for the transmission of a certified copy of the decree together with a certificate of non-satisfaction and no more, and the order made in substance was that the application should be granted. The actual words of the order were "let execution issue as prayed." These words necessitate a reference to the application which, as already stated, was not an application for execution but

(1) (1909) 11 C. L. J. 91 (93).

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for the transmission of a certified copy of the decree. It was said during the argument that the application had to be made on the form, above-mentioned, as there was no other form provided: To my mind the use of a particular form cannot affect the matter when once it is established that the application was not for execution, but merely for transmission of a copy of the decree. All that happened in reality was an application to the Registrar for transmission of the copy of the decree, a direction by him that notice of such application should be given to the judgment-debtor, and on his non-appearance an order that the copy of the decree should be transmitted in accordance with the application. Under these circumstances, in my judgment, there was no determination that the decree was still capable of execution, and the order of the 30th June 1908 did not constitute a revivor within the meaning of clause 183.

It was further argued, however, that the notice issued under the directions of the Registrar and the order of 30th June 1908 taken together constituted a "revivor." It was urged that the notice to show cause was contemplated by Article 183 as a revivor in the same way as under Article 182 and that such notice and the order had the same effect as the procedure of *Scire facias*.

It is true that the direction given by the Registrar was that notice under section 248 should issue, and it has also been held, that the procedure embodied in sections 248 and 249 is analogous to the Procedure of *Scire facias* and that such procedure when properly and rightly used would constitute a revivor. See *Jogendra Chandra Roy v. Shyam Das* (1); but in my judgment sections 248 and 249 were not applicable to the matter in question. These sections deal with an application for the execution of a decree and provide for notice being given to the party against whom execution is applied for, and if he does not appear, or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

They have no relation, in my opinion, to an application for the transmission of a copy of the decree under section 223 which may be ordered according to the words of the section "on the application of the decree-holder." The notice therefore which was issued under section 248 was inapplicable to the proceedings in question. But it was urged by the learned Advocate General that if the Court has in fact sent notice to the debtor and has in fact adjudicated upon the matter, something has been done to show that the decree is capable of execution.

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I think it would be unreasonable so to hold when, having regard to the facts of the case, it is plain that the Registrar did not adjudicate upon the question whether the decree was capable of execution, but merely ordered a copy of the decree to be transmitted to the Murshidabad Court, with a certificate of non-satisfaction. Further, even assuming that the notice was rightly sent and in accordance with the provisions of the Act by the Registrar, it should be pointed out that the Registrar would have no jurisdiction to adjudicate upon any matter such as Limitation, with reference to the question whether the decree was capable of execution. Such a question would, in my judgment, have to be determined by the Court itself under section 249 of the Civil Procedure Code.

It is true that by section 637 of the Civil Procedure Code any non-judicial or quasi-judicial Act which the Code requires to be done by a Judge, may be done by the Registrar, and the Court may by rule declare what shall be deemed to be non-judicial or quasi-judicial acts within the meaning of the section. Rule 515 A, which came into force on 1st September 1905, provided that certain applications therein specified should be made to the Registrar or Master, and that all acts done by the Registrar or Master under this rule should be deemed to be quasi-judicial. No. 30 under the said rule refers to applications for order for execution of a decree or order for arrest, attachment, sale or otherwise, with power to order issue of notice under section 248, Civil Procedure Code, where such notice is necessary. But it is clear that the Registrar was not thereby clothed with authority to decide such a question as arises in this case, viz., whether the decree was barred by the Statute of Limitation.

It was argued, however, that Rule 370 of the Rules then in force, which are set out in Mr. Belchamber's book, showed that it was incumbent upon the Registrar to issue the notice. This Rule came into force on the 1st April 1878, judging from the note attached to Rule 345 in Mr. Belchamber's book and therefore before the 1882 Code. It may or may not have been consistent with the Code which was in force at the date when it was passed, but in my judgment it was not consistent with the scheme of the Code of 1882. Under that Act the application for a transmission of the copy of the decree to another Court under section 223 was a procedure under which the question whether the decree was capable of execution was intended to be left to the Court to which the copy of the decree was transmitted : a procedure different in its essentials from the procedure provided for an application for execution dealt

with in subsequent sections of the Act. In any event I think it is safe to say that these rules must be read as modified by the Civil Procedure Code of 1882 under which the application in this case was made, and in my judgment the notice issued and order made under the abovementioned circumstances did not operate as a Revivor within the meaning of Article 183 of the Limitation Act, Schedule 1.

It is necessary to notice a further argument by the learned Advocate General, viz., that with regard to a decree on the Original Side the word "Revivor" in article 183 meant the same thing as one or more of the matters which are mentioned in article 182, sub-clauses 5 and 6.

With this I cannot agree. I think the fact that the word "Revivor" is used in article 183, instead of the different matters specified in article 182 being set out again or referred to in article 183 as might have been done, shows that something different to such matters was intended. Further the conditions dealt with by the two clauses are essentially different and the periods of limitation vary materially.

For the abovementioned reasons, in my judgment, the answer to the question referred to us should be that the application of the 1st June and the order of the 30th June do not constitute a Revivor within article 183. The result will be that the appeal will be allowed, that the order of the learned Judge will be set aside, and that the attachment effected on the property of the defendant, viz., 147 Cotton Street, will also be set aside. The defendant will have the costs of the application in the Court below and of this appeal.

Woodroffe, J.—The Advocate General accepts the definition of revivor as a decision holding that the decree is still capable of execution. He admits that an application for transmission of decree is not a revivor. It is further conceded that even an order for transmission might be regarded as a ministerial act and not as a revivor. In my opinion an order for transmission as such is not an order on an application for execution though it is an order on an application in execution. It is a proceeding taken with a view to further action by way of execution elsewhere on which action unless previously determined the question of the right to execute the decree is decided. It is however argued that in the present case there was something more viz., the issue of a notice under section 248 and an order for issue of execution. According to the Code a notice under section 248 does not issue on an application for transmission under section 223. But assuming

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that this was done under R. 370 of the old Rules, the question arises whether that Rule which would seem to have been passed under the Act of 1859 was of force under the Code of 1882. But even if it was this does not assist the creditor. For if the Registrar had power to issue as a "quasi-judicial act" notice under 248 he had no power to determine judicially that the decree was alive had the debtor contested the point. The Judge must have done that and the fact that the debtor did not appear on the notice cannot give the order passed that judicial character which is necessary for an order operating as revivor. It is to be observed that the order passed was "let execution issue as prayed." The last two words make the order operative as one for transmission of the decree; for this was what was asked. In any case it cannot be said that the Registrar either could or did decide that the decree was capable of execution. The proceedings taken did not in my opinion operate as a revivor within the meaning of Art 183 of the Limitation Act. The decree was transmitted to Murshidabad and so far as appears from the proceedings before us nothing was done on the order and nothing was attempted to be done in execution until nearly seven years later. I would therefore answer the question referred to us in the negative, and I agree in the order passed.

Mookerjee, J.—The facts material for the determination of the question of law referred to the Full Bench for decision, are not set out in the order of reference and may be briefly recited here.

On the 21st May, 1896, the respondents obtained an ex-parte decree for money against the appellant on the Original Side of this Court. After intermediate proceedings, which need not be described in detail at this stage, the decree-holders, on the 18th January, 1915, made the present application for execution of the decree by attachment of premises 147 Cotton Street in this City. The judgment-debtor objected that the application was barred by limitation under Art 183 of the schedule to the Indian Limitation Act, 1908 which was in force at the date of the application and governed it on the principle that the law of limitation applicable to a proceeding is, unless there is a distinct provision to the contrary, the law in force at the date of the institution of the proceeding (*Lala Sonce Ram v. Kanahi Lal* (1). The objection was overruled by Mr. Justice Chaudhuri on the 2nd August, 1915 and the propriety of this decision is in question before us.

It is plain that the application for execution is *prima facie* barred under Art. 183, which requires an application to enforce a decree of

(1) (1913) L. R. 40 I. A. 74 ; I. L. R. 35 All. 227 ; 17 C. L. J. 488.

a court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction, to be made within twelve years from the date when a present right to enforce the decree accrues to some person capable of releasing the right. As the application for execution, with which we are here concerned, was made on the 18th January, 1915, in respect of a decree, dated the 21st May, 1896, the decree-holders seek to escape the bar of limitation by reliance upon that portion of the proviso to Art. 183, which lays down that when the decree has been revived, the prescribed period of twelve years shall be computed from the date of such revivor. It is thus incumbent upon the decree-holders to establish that the decree was revived within twelve years from the 21st May, 1896, and that since the date of such revivor, twelve years had not elapsed on the 18th January, 1915. To substantiate this position, they rely on an application made by them on the 1st June, 1908, and the order passed thereupon on the 30th June, 1908; the combined effect of the application and the order was, it is argued, to revive the decree within the meaning of the proviso to Art. 183. This view is supported by the decision in *Suja v. Monohur* (1), though a contrary view had been accepted when that case was heard in the first instance *Suja v. Monohur* (2). The contention of the decree-holders also receives some support from the decisions in *Umrao Singh v. Lachmi Narain* (3), and *Beni Madho v. Shiva Narain* (4). The correctness of these decisions has, however, been impugned before us on behalf of the judgment-debtor.

There is no definition of the term "revivor" in the Indian Limitation Acts of 1859, 1871, 1877 and 1908: But the historical review contained in the judgments in the cases of *Ashoo Tosh v. Doorga Churn* (5), *Futteh Narain v. Chundrabati* (6), and *Jogendra Chandra v. Shyam Das* (7), shows beyond doubt that the procedure for revivor of judgment on the Original Side of this Court was substantially analogous to the writ of *Sine facias* under the Common Law (Rule 195 of the Rules of 1851 on the Plea Side of the Supreme Court). That procedure was subsequently embodied in sections 248 and 249 of the Civil Procedure Code of 1882, and later on reproduced as Order 21, rules 22 and 23 of the Code of 1908. Under these provisions, where an application for execution is made, a notice is required to issue to the person against whom

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(1) (1896) I. L. R. 24 Calc. 244.

(2) (1895) I. L. R. 22 Calc. 921.

(3) (1904) I. L. R. 26 All. 361.

(4) (1907) 4 A. L. J. 405.

(5) (1880) I. L. R. 6 Calc. 504; 8 C. L. R. 23.

(6) (1892) I. L. R. 20 Calc. 551.

(7) (1909) I. L. R. 36 Calc. 543; 9 C. L. J. 271.

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execution is applied for, if more than one year has elapsed from the date of the decree. The notice calls upon him to show cause why the decree should not be executed against him. If he does not appear or does not show cause to the satisfaction of the Court, the Court orders the decree to be executed. The order for execution thus made, operates as a revivor; but the mere issue of the notice does not by itself produce that consequence: *Monohur v. Futteh Chand* (1). This fully justifies the rule enunciated in *Kamini v. Aghore Nath* (2), namely, that to constitute a revivor of a decree, there must be, expressly or by implication, a determination, that the decree is still capable of execution and the decree-holder is entitled to enforce it. It is of vital importance to add that such determination, must, be made, with jurisdiction and by a competent tribunal. Tested in the light of this principle, what is the true position of the decree-holders in the case before us? On the 1st June, 1908, they applied for transmission of the decree from the Original Side of this Court to the district of Murshidabad, on the allegation that the judgment-debtor had no property within the local limits of the Ordinary Original Jurisdiction of this Court, while he had property within the jurisdiction of the other Court. The application, though made obviously under section 223, clause (b) of the Code of 1882, was described as one under section 235 for execution of the decree; this was indisputably misleading, and if we look to the substance of the matter, as we must do, we cannot attribute to the application a character it did not really possess; what is essential in matters of this description is the substance and not the mere form. The Master recorded the following order on the application on the 1st June, 1908: "Let notice issue under section 248(a)." This clearly was not in conformity with the Code, which contemplates the issue of a notice under section 248 on the basis of, not an application for transfer of a decree under section 223, but an actual application for execution under section 235. The scheme of the Code in this respect will be found fully analysed in the case of *Sreepati v. Shamaldhone* (3), and need not be reproduced here. The substance of the position is that the group of sections (A) from 223 to 229 B in Chapter XIX deal with the Courts by which decrees may be executed, while the group of sections (B) from 230 to 238 deal with applications for execution. These sections indicate that an application for transfer of a decree is in no sense an application for execution (*Nilmony v. Birissur* (4), *Chatterput v. Daya Chand* (5), *Khetpal v. Tikam* (6),

(1) (1903) I. L. R. 30 Calc. 979.

(3) (1910) 15 C. L. J. 125; 15 C. W. N. 661.

(5) (1911) 23 C. L. J. 641.

(2) (1909) 31 C. L. J. 91.

(4) (1885) I. L. R. 16 Calc. 744.

(6) (1912) I. L. R. 34 All. 396.

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which dissents from *Ramsahai v. Nanni* (1). It is not necessary for us to consider whether as indicated in *Bhabani v. Pratap* (2), an application for transmission of a decree may not be deemed an application to take a step in aid of execution ; nor is it necessary to discuss whether as indicated in *Husein v. Saju* (3), a Court may not decide the question of limitation even before transmission of the decree, or, whether, as ruled in *Srihary v. Murari* (4), even after transmission, the original Court may not under Sec. 239 of the Code of 1882, decide the question of limitation when execution had been stayed in the Court to which the decree has been transferred. For the purposes of the present case, it is sufficient to hold that Sec. 230 makes it plain that the application for execution must be presented to the Court to which the decree has been transmitted for execution, while the explanation to Sec. 248 shows that the notice required by that section must, where the decree has been transmitted, be issued by the Court to which the decree has been sent for execution. Consequently, the issue of the notice in this case under Sec. 248, on the basis of the application for transmission of the decree, was not in conformity with the Code of 1882 which was in force at the time. It is said, however, that the action taken by the Master was in accord with the Rules framed by the Court when the Code of 1859 was in force: *Sreenath v. Romesh* (5). It is needless to investigate whether the Rules, when first framed, were consistent with the Code of 1859 ; for even if they were, it is plain that after 1882, they could be deemed operative only in so far as they were consistent with the Code of 1882: *Baijnath v. Ahmed* (6). It is significant that the Rules framed after the Code of 1908, have been made consistent with that Code, and a notice under Order XXI, Rule 22 is no longer required to be issued upon an application for transmission under Sec. 39. We next pass on to the order made by the Master on the 30th June 1908 on return of affidavit of service of the notice under section 248: "upon reading the notice and the affidavit of service, no cause being shown, let execution issue as prayed." The language of the concluding portion of this order is significant ; what was prayed was transmission of the decree, and what was actually done pursuant to this order of the Master, was, not the issue of any process of execution, but only a transmission of the decree on the 17th July, 1908. Here again if we look to the substance of the matter, as we must do, we find that there was in reality no determination by the Master that the decree

(1) (1897) I. L. R. 20 All. 79.

(3) (1890) I. L. R. 15 Bom. 28.

(5) (1903) 12 C. W. N. 897.

(2) (1904) 8 C. W. N. 575.

(4) (1886) I. L. R. 13 Calc. 257.

(6) (1912) I. L. R. 40 Calc. 219

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was still capable of execution. It is further plain that the Master had no authority to make such a determination; for section 249 requires that the court should consider the objection if any and determine whether the decree should or should not be executed. This is clearly a judicial act which cannot be delegated to a Master under section 637 of the Code of 1882, and it is worthy of note that although Rule 515 (A) invests the Master with power to order issue of a notice under section 248, it does not authorise him to give a decision under section 249. It is, I think, incontestable that there was not in this case an order under section 249 by the Master, and, that, if there was, the order must be treated as made without jurisdiction. My conclusion consequently is that upon the application for transmission of the decree under section 223, a notice under section 248 could not properly be issued, that such notice, though issued, did not by itself operate as revivor of the decree, and that there was not in fact and could not in law be such a determination by the Master under section 249 as would operate to revive the decree.

It is not necessary to examine in detail the contention that Art. 183 should be construed in the light of Art. 182 and that whatever is sufficient to keep alive a decree for the purposes of Art. 182 should be deemed sufficient for the purposes of Art. 183. There is in my opinion, no basis whatever for this contention; the scheme and scope of the two Articles are radically distinct, and no useful purpose would be served by an endeavour to amalgamate them or to interpret the one by reference to the other.

On these grounds, I agree that this appeal must be allowed with costs throughout, the order of Chaudhuri J., set aside and the attachment cancelled.

Chitty, J.—I agree for the reasons given by the learned Chief Justice that the question referred to us should be answered in the negative. I have nothing further to add.

N. R. Chatterjee, J.—I am also of the same opinion.

A. T. M.

Appeal allowed.

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CALCUTTA, JANUARY, 1916.

{ NO. 1.

LAND TENURE IN ANCIENT INDIA.

The sources of our information as to the land tenure during the Hindu period of Indian history are, however, very limited. The Hindu law books are singularly defective in respect of the rules relating to the tenure of land, and to the mutual rights of the various classes engaged in its cultivation. From the Code of Manu, for instance, we obtain little help. We find only casual mention of rights in land : the general theory of land right is not touched upon, but only some special cases thereof (1). This peculiarity is all the more striking, because the real wealth of the country is and has always been agricultural (2). The question has to be answered in the silence of express law by a reference to the actual practices and the ideas of the time (1). Besides, the researches into the archaic laws and customs of the different nations, which have been carried on by the western scholars with their accustomed vigour and success, have brought to light the existence of certain institutions amongst them in ancient times. And in the light of these discoveries we may approximately ascertain the state of the land law in India during those ancient times. To a student who would confine his attention solely to the ancient Sanskrit documents of Hindu law and usage, much of the evidence they furnish will be lost or devoid of meaning. But if he makes a study of similar institutions in other countries and takes a broader and comparative view of the subject, many of these which he might at first pass over as useless and unimportant will assume a new significance.

Proper method of study.

The Hindu Codes of Law do not distinctly state *to whom the property in the soil belonged*. But two different and somewhat con-

(1) Phillip's *Law relating to the Land Tenures of Lower Bengal*, Tagore Law Lectures. 1874-75, 3-4.

(2) Maine's *Village Communities of East and West*, 51.

Different theories
as to property in
land according to
ancient Hindu law.

King, if proprietor.

Views of Mill.

Of Vincent Smith.

Of Hopkins.

tradictory theories as to the ownership of the soil during the Hindu period have been put forward by western scholars. According to some ownership in the soil vested in the king, while according to others in the subject who cultivated it. Thus Mill, the celebrated Historian of India, holds (1) that according to the ancient lawgivers the *King had the absolute property in the soil*. He comes to this conclusion by analogy with the custom of some barbarian tribes recognising this principle, as stated in the writings of certain travelers, and by referring to certain passages in the Institutes of *Manu* where the King is called "*the lord paramount of the soil*" (2) and where the occupier of land is held "responsible to the King if he fails to sow it" (3). It is probably on the authority of Mill that a more modern historian of ancient India, Vincent Smith, dealing with the subject of land revenue during the reign of Chandra Gupta, the first Maurya Emperor of ancient India, has expressed the opinion that "the native law of India has always recognised *agricultural land as being crown property*, and has admitted the undoubted right of the ruling power to levy a Crown rent or 'land revenue,' amounting to a considerable proportion either of the gross produce or of its cash value (4). And in his book on the Emperor Asoka the Great, he also has re-iterated the above opinion without adequate data. He writes thus:—"An *agricultural land was regarded as crown property* and the normal theoretical share of the state was either one-fourth or one-sixth" (5). In the latest edition of his History of India he could cite as an authority for the view only a passage from a commentary on text of the *Artha-Sastra of Kautilya* which runs thus:—"Those who are well-versed in the Sastra admit that the King is the owner of both land and water and that the people can exercise their right of ownership over all things excepting these two" (6). Another modern authority in America (7) collects evidences from the earliest Vedic age to the later days of the *Smritis* on the basis of which he strongly supports the view that the *King* was recognised as the *owner of all the land*. He writes:—"It was unquestioned that the King was the

(1) Mill's '*History of British India*' Vol. I. 180.

(2) *Manu Samhita*, Chapter VIII. 39. "भूमिरधिपतिर्विभुः ।"

(3) Ibid, 243:—"चेद्विकस्यावयि दक्षो भानाद्भवयो मवेत् ।"

(4) Vincent Smith's '*The Early History of India*' Ed. 1904, 123; also Ed. 1914, 130-131.

(5) Ibid *Asoka*, Rulers of India Series, 2nd Ed. 96.

(6) 3rd Ed. (1914), 131 the original passage runs thus:—"राजा भूमिपतिर्विभुः भ्रातृभ्यश्च दत्तस्य च । ताभ्यामवयवभूतस्य तव स्वायं कुटुम्बिनाम् ॥"

(7) Hopkins '*India Old and New*' 221 &c.

master of all. The *King* is not only the over-lord, he is the owner and one of his old titles is—'The one owning all.' The King in the earliest period (in the recorded ceremony of inauguration) is expressly said to be the "*devourer of his people*." This is no isolated phrase nor are the people other than his own" (*vaisyas*). *

Arguments in support.

* * * And he refers to a passage in the *Aitareya Brahmana* according to which the *Vaisya's* peculiar function is to be devoured by the priest and the king (VII. 29-3). "It is non-sense" he says "to suppose a peasant proprietor openly described as fit only to be robbed by the king, could have any secure hold on his landed property." The king's ownership extended to all property except a priest's which is especially described as the only land in his realm 'outside the king's district' (*ś ca*). We find the same view also in the legal literature. *Bṛihaspati* (500—600 A. D.) says that the reason why the king becomes heir to property left without another heir (male issue, wife or brother) is that he is the "*owner of all*" and, *Narada*, who wrote about the same time or a little earlier, says that the real estate held for three generations cannot be estranged except by the king's will. Again, *Bṛihaspati*, while discussing the question :—[to which man does a land taken from a village belonging to one and transferred to another man either by the action of a river or by the king, belong ?] says "It belongs to him who gets from river or from the king." The king gets half the treasure-trove and when he gives a village to a priest he gives him as owner the right to all the treasure-trove. The Epic also has many passages shewing that, while a priest claimed a divine right to possess everything in theory, he abrogated this in practice, and in consequence everything belongs to the king to give. 'Only a warrior (king) may give land to a priest'—it is said, and conversely it is said again :—'Land may be taken possession of only by a king.' 'It is a vedic utterance that the *King is the owner of the wealth of all save the priests*' is another statement made alike by law and epic. Furthermore, although the epic kings are perpetually admonished by the sages not to do wrong to the people and although various sins against them are enumerated as possible, yet it is not once hinted that the king should not rob his subjects of land, as we might expect to meet if the land were regarded as originally the peasant's own, in the vast epic literature and the wide range of legal *śastra*. It is only till the 5th century A. D., that the king is admonished 'Not to upset the two foundations of the peasant's life, his house and his field' (*Narada's Law Book*) *

* * * Further the king is declared to be 'the preserver

and destroyer' of his people who are still as of old to be 'devoured' by taxes or otherwise as the King sees fit and when he needs it, 'the King may take all the possessions, small and great of those who break the ten commandments (of morality) and possessions of any one save a priest.' He gives and gambles away fields, villages, and whole districts at pleasure. Nor is such a gift of a village a presentation of a right to tax alone. As the recorded copper plate grants of the first centuries shew, the grantee is made absolute owner, not relative as in the case of an overlord." He further refers to the passage in the *Manava Dharma Sastra* which describes the King as the 'lord of all' (1) a phrase which Buhler, another great authority, is inclined to interpret as a proof of land-owning (2) on which Mill also bases his view as we have already stated. Buhler also regards the rule as to King's right to make gift of a village to the priest as a distinct recognition of the principle that the ownership of all land is vested in the king (2).

Not conclusive.

The evidence however is quite inadequate to prove what is sought. The power of "devouring the people" to which reference has been made by Hopkins is undoubtedly a *political power*, and has no connection with the right of ownership. Hopkins thinks that the gift of land to priests, which seems to be the first sign of land transactions in the *Brahmanas*, was an *actual gift of land*. But the evidence on the point to which he draws our attention is inconclusive of the matter. It may have been so in many cases, but it may easily also have been explained as the grant of the *mere superiority apart from ownership in the soil*. And the epic grants on which he relies are hardly decisive one way or the other (3). With regard to the other evidence, the most important perhaps on which Hopkins so much relies, the authoritative interpretation of the text of the *Veda* on which it is based does not lend any support to his theory. Thus the great *Jaimini* in his *Mimansa Darsana* discussing this question, distinctly lays down that the maxim of law that "the king is lord of all, excepting sacerdotal wealth" concerns his authority for correction of the wicked and protection of the good. His kingly power is for government of the realm and extirpation of wrong; and for that purpose, he receives taxes from husbandmen, and

King entitled to share of produce.

(1) *Mann*, Chapter VIII. 39.

"निधीनाम्नं पुराणानां वानुमानि च विधी ।

वर्धनान् दण्डाद्वारा धृतिरधिपतिर्हि ॥"

(2) In his note on *Mann* *loc cit* S. B. E. 25, 259.

(3) See Macdonell and Keith's '*Vedic Index of Names and subjects*.'

levies fine from offenders. But *the right of property is not vested in him*; else he would have property in the house and land appertaining to the subjects abiding in his dominions. The earth is not the king's but is common to all beings, enjoying the fruit of their own labour. "It belongs," says *Jaimini*, "to all alike." (1). *Savara Swami* commenting on this passage says:—"the king cannot make a gift of his kingdom for *it is not his*, as he is *entitled only to a share of the produce by reason of his affording protection to his subjects.*" (2) And *Sayana*, the celebrated commentator of the Vedas, adds—"A king's sovereignty lies only in his punishing the wicked and protecting the good" (3). The records of Hindu thought from the earliest time down to the dawn of history are unanimous in this theory of the king's right. With regard to the passages on which Mill relies it may be pointed out that as the king is, elsewhere in the Code of *Manu*, described as "*the regent of the waters and lord of the firmament*" (4), the first passage, on which he bases his opinion, is not conclusive. Besides, it gives the reason why old hoards and minerals in the earth belong to the king, and has nothing whatever to do with the property in the soil. The second passage is intended for the protection of the share of the produce of the soil to which the king is, by law, entitled, on account of his revenue.

The original text of *Kautilya* from the commentary on which the passage has been cited by Vincent Smith in the latest edition of his History of India has no reference to the question now in issue. Even *Kautilya*, the minister of Emperor Chandra Gupta Mourya, whose devotion to the task of empire building compelled him to exalt the position and dignity of the Emperor never claimed for him the ownership of the soil of empire. And in the passage referred to the commentator only makes a general reference to the Sastras without citing the particular texts in which he relies for his proposition; and on the face of the Sastric texts we have already cited his opinion as to what is laid down in the Sastras cannot be accepted as authoritative on the matter. An examination of the ancient sanskrit texts dealing with the king's revenue clearly shews

Implying cultivator's proprietary right to soil.

Sources of king's revenue indicate the same.

(1) *Jaimini* 6-7, 2: Colebrooke's *Miscellaneous Essays*, 345.

(2) *Savara's* Commentary on the above—"राज्यमीनले सले

तदधिकं यत्तु राज्ञी इति यां कथूनानां वीर्यादीनां रचयेन निमित्तस्य कर्त्तायि भानस्य इति न सूत्रे: ।"

(3) *Sayana's* Commentary on above "इदमिवा हि परिपालनायां राज्ञे इति तत्त्वज्ञानमिति सति । न राज्ञी भूमिपते, किन्तु तस्मां भूमी कस्यै कसं भूतानां कस्यै वा प्राणिनां वाचारेण चर्त्तते ॥"

(4) *Manu*, Chapter VII, 7. "सर्वस्य च नदीषु प्रजापते: ।"

that he was *never regarded as the proprietor of the soil*. He was *entitled only to a share of the produce of the land* in the occupation of his subjects. Thus in the *Rigveda*, the most ancient record of the human race, this view of the king's right which runs through all the later law books, is found. It is there stated :—"May Indra ordain that your subjects may pay you tax (*Vali*)" (1). And the lexicographers are unanimous in stating that the word '*Vali*' is always used in the technical sense of the king's share of the produce. The *Upanishadas* stand next in order of time to the *Vedas* and the *Brihad Aranyaka Upanishada*, explaining in a parable the relationship between the senses and the organs of action on one side, and the chief *Prana* (consciousness) on the other, goes on :—"The *Prana* then said to the senses that if they were convinced that he was the superior they must pay him *Vali*" (2). The expression used in the text is '*Vali*' which has been explained by *Sankaracharyya* in his commentaries on the said *Upanishada* as meaning *kara* or tax ; and we have already seen that the term is synonymous with the king's share. We have abundant evidence in *Dharma Sutras*, the class of works that came next into vogue, as to the *king's right to a share of the produce*. Thus *Gautama*, the earliest of the *Sutrakaras* says :—"The cultivator must pay to the king a tax amounting to one-tenth, one-eighth or one-sixth of the produce" (3). *Baudhayana*, who is later than *Gautama* says :—"Let the king protect his subjects receiving from them a sixth part" (of their incomes). (4). The aphorisms of *Apastamba*, another early *sutra* writer, contain the following text :—"He (the king) shall make them (his subordinates) collect the lawful taxes (*Sulka*)" (5). The word *Sulka* is here used which *Haradattas* in his commentary explains to mean a twentieth part of the merchant's gain. *Vasistha* speaking of the king's right agrees in the opinion of the other sages (6). The later sages also are unanimous in this theory of the king's right. Thus *Manu* lays down :—" * * * of grain an eighth part, a sixth part or a twelfth part (may be taken by the king) according to the nature of the soil

(1) *Rigveda* VIII. 8. 173—"वचो न वन्दः केवचोर्वचोवसिष्ठतकारत् ।"

(2) *Brihad Aranyaka Upanishada*, Chapter VIII.

(3) *Gautama*, Chapter X 24. *Sacred Books of the East* Vol. II. 227-228.

(4) *Baudhayana*, *Prasna* I, *Adhyaya* 10, *Kandica* 18, verse 1.

"वत्सामधत् राजा रचेत् प्रजाः"—Buhler. 192.

(5) *Apastamba*, *Prasna* II, *Patala* 10, *Kanda* 26, verse 9, *Sacred Books of the East*, VII. 162.

(6) *Vasistha*, Chapter XIX 26-27.

and the labour necessary to cultivate it (1), or more in cases of distress (2). Such is also the view expressed by *Yajnavalkya* in the verses noted below (3). *Narada* defines 'Vali' as a sixth of the produce of the soil and mentions it as an item of the king's revenue (4). The *Vishnu Smriti* dealing with the king's revenue says:—"He must take from his subjects as tax a sixth part of every ear of the paddy" (5). In the *Mahavarata* also a sixth portion of the produce of the land is mentioned as a source of the king's revenue (6). Such is also the rule laid down by *Kautilya* in his *Artha Sastra* (7), and *Sukracharya* in his *Niti Sastra* (8).

From the above it is clearly shown that the only right which the king possesses over the land in the occupation of the subjects is a right to a share of its produce, though the authorities are not unanimous as to the extent of this share, the opinion of the most of the text-writers being that it is one-sixth, while according to some an eighth, tenth or even a twelfth is considered as proper and the utmost that the king could claim under any circumstances was one-fourth. Be that as it may, as the king's share is so limited, as stated above to one-sixth, or at most to one-fourth, it may be fairly argued that there must have been another proprietor for the remaining five-sixths or three-fourths, who must obviously have had the greater interest of the two in the whole property shared (9). This is the *cultivator of the soil*, who must accordingly be held to its *proprietor*.

The different sources of the revenue of the ancient Hindu King, as enumerated by the law-givers, such as *Gautama* (10) *Apastamba* (11)

(1) *Manu*, Chapter VII. 130 :—"वात्मानसमोमान वडो वादय एव वा ।"

(2) *Ibid* Chapter X. 120 :—"धान्येऽष्टमं विंशं शुल्कं विंशंकार्षापचावत् ।"

Ibid, 118 :—"अनुषंगमाददानोऽपि अदियो भागमापदि । प्रजारक्षन् परं यत्ना क्लिप्तान् प्रतिमुच्यते ।"

(3) *Yajnavalkya Samhita*, Bombay Edition, 99—"पुण्यात् वडुभागमादत्त न्यायिन परिपालयन् ।"

(4) *Narada Smriti*, Chapter XVIII. 48 :—"भूतिः वडुभाग अस्मितात् । वलि स ।"

(5) *Vishnu Smriti*, Chapter III, 22 :—"प्रजास्यो वल्यर्थं संवत्सरेण धान्यत. वडु' समादद्यात् ।"

(6) *Mahavarata, Santi Parva*, Chapter I. Section 71.

(7) *Book II*, Chapter I.

(8) *Book IV*, Chapter II. 22-30.

(9) *Elphinstone's History of India*, 9th Edition, 26.

(10) *Gautama*, Chapter X, verses 24-34.

(11) *Apastamba*, *Prasna II*, *Patala 10*, *Kanda 26*, verse 9.

Baudhayana (1) *Vasistha* (2) *Manu* (3) *Yajnavalkya* (4) *Narada* (5) and also the *Mahavarata* (6) shew that none of them have any connection with the property belonging to the king and can be identified with *rent* or fee for the use of another's property, and the fact that the taxes on the produce of the land and on certain movables are placed on the same footing indicates that the demand of the king from the cultivator of the soil does not stand on a higher footing than that, for instance, from a merchant upon goods sold, and that in each case the ownership over the taxable property is with the tax-payer and not with the king who is entitled to the tax only.

Earth *res nullius*
according to ancient
Hindu Law.

Besides the above indications we have positive evidence to shew that the proprietorship in the soil always rested with the cultivator. According to the ancient Hindu law, as according to the ancient Roman law, land not brought under cultivation or not taken possession of with the object of appropriating it, is, like fishes of the rivers and seas, the fowls of the air, or the wild animals of the forest, *res nullius* (*aswamika* i.e. without owner). Thus in the *Usanas Samhita* we find it laid down that "forests and waste lands *** are said (by the sages) to be without owner" (7). This ancient Hindu law of *res nullius* in respect of jungle land is repeated almost in the self-same words in the *Mahavarata* (8) indicating that it was one of the universally recognised maxims of the law, never open to question, that unreclaimed jungle land was without any owner.

(1) *Baudhayana*, Prasna I, *Adyaya* 10, *Kandika* 18, verse 1.

(2) *Vasistha*, Chapter XIX 26-27.

(3) *Manu*, Chapter VIII, 307. They are :—(i) *Vali* (ii) *Karsa* (iii) *Sulka* (iv) *Prativaga* (v) *Danda*. For their meanings see *Kulluka's* commentary.

(4) *Yajnavalkya*, Bombay Ed., 98-99.

(5) *Narada*, Chapter XVIII.

(6) *Mahavarata*, *Santi Parva*, Chapter I, Section 70.

(7) *Usanas Samhita*, Chapter V, 16 :—अटव्यः पर्यन्ताः पुन्यतीर्थाश्च वानतानि च सर्वानि अस्मानिवाणि बाहुः ।

(8) *Mahavarata Anusasana Parva*, Chapter LXVI. 35. अटवो पर्यन्ताश्च वानतः सर्वानि अस्मानिवाणि बाहुः ।

BERHAMPORE.

Radha Romon Mookerjee
Vakil.

(To be continued.)

The Calcutta Law Journal.

VOL. XXIII. } CALCUTTA, JANUARY, 16, 1916. } No. 2.

LAND TENURE IN ANCIENT INDIA.

But along with the idea that the earth was *res nullius* there runs through our sacred books a parallel idea that, the earth was the common property of all men just as air and water. In fact our *Rishis* made no distinction in principle between *res nullius* and *res communes*. Thus according to *Jaimini*—"The earth cannot be given away as it is the common property to all" (1). *Savara swami* commenting on the aphorism says :—"The earth is the common property of all human beings *** none can be the owner of the whole earth" (2), and *Sayana* explaining the same passage says :—"The soil is the common property of all and they through their own efforts enjoy the fruits thereof" (3). These passages are sufficient to shew that the earth and all things therein were the general property of mankind from the immediate gift of the creator.

But though the sages thus regarded the earth to be the common property, they held that a right to particular portion of it might be acquired. This is by *appropriation*, that is to say, by taking possession of it with the intention of keeping it as one's own. And the first act which shews such an intention was undoubtedly the reclamation of the jungles. It naturally follows from the above that proprietorship originates with the act of reclamation, and the peasant who reclaims and converts the jungle into arable land becomes thereby the proprietor of the same. This is clearly stated by the great *Manu* in the following passage :—"Even as the wild deer of the forests become the property of the man who first pierces them with arrows, so does the arable land, they say, become the property of the man who first cuts down the jungle for purposes of cultivation" (4). And the commentator *Kulluka* in explaining the same says :—"The

Ownership in particular portions thereof.

How acquired.

(1) 'न भूमिः स्वाम्यं सर्वान् प्रवर्तयितुं शक्नुते,' Chapter VI. 7. 2.

(2) वेदावागीजितो मनुष्य इत्यने ननु कुतश्च दृष्टिमीक्षक—Mimamsa Bhashya, Chapter VI. 7. 2.

(3) तस्मा भूमी स्वाम्यं सर्वान् प्रवर्तयितुं शक्नुते साधारण धनं यतोऽसाधारण्यं भूतत्वात् इत्यनेन ननु भूमिदानं नास्ति । Nyaya Mala Vistara 358.

(4) मनु, Chapter IX 44 :—"काम्येभ्यः केदारमायुः प्रवर्तयितुं शक्नुते ।"

field is spoken of as the property of the man who removes the fixtures (jungle) and thereby converts the jungle into a field" (1). It is clear therefore that our ancient law looked upon the jungle and other-unreclaimed waste lands in the same light as the fowl of the air, or the fish in the sea, or the wild animals of the forest, which any man may seize and appropriate for himself. For acquiring proprietorship in such lands there was but one way open and that was by reclamation. Whoever reclaimed any jungle land became its proprietor himself and his heirs after him. And so far as proprietorship was concerned, the king stood on the same footing as his subjects. Like them he himself might also acquire the right of property in the land by reclamation. So that they would be crown lands quite as much as they are in England. From the above it is clear that the cultivator was the proprietor of his own land that he cultivated. In the words of the commentator *Savara* :—"Men are the lords of their own fields" (2).

First tiller of soil
owner.

King's share called
Vali is offering
not rent.

If the cultivator himself and not the king is the proprietor of the cultivator's land, the question naturally arises—why is he to pay *rent* for it, be it a fixed share of the produce of the soil, to the king. The Anglo-Saxon freeman (*icorl*) had not to pay rent for his free-hold, the Swiss or the French peasant proprietor had not to pay rent for his holding to the king. The Indian peasant proprietor also like his Swiss or French *confere* had not to pay, what we called *rent* for the land he holds. That fixed share of the produce which he had to pay to the king was paid not for the use and occupation of the land which belonged to the king. In our ancient *Sastras* it was called the 'Vali' or a voluntary offering and the delivery of the king's share of the produce is described as the '*Validana*' (बलिदान) or the voluntary gift of the 'Vali' to the king (3). The king was called the '*Visampati*' (विषाम्पति) or the protector of the 'Vis' (विष) or the people, and as such the *Vali* (बलि) was paid to him at first freely as a contribution for the performance of the onerous duties of his office. As pointed out by *Savara Swami*, while commenting on the text of *Jaimini's Mimansa* already referred to :—"The king is entitled to a share of the produce by reason of his affording protection to his subjects" (4).

(1) येनखादुमुत्पाद्य येन कृतं तस्यैव तत्त्वमेव बहन्ति ।

(2) वेदाचार्योद्धितारो मनुष्या इत्यनेन ननु कुतश्चल इति श्रीमनीषस—*Mimansa Bhashya*, VI. 7. 2.

(3) राजे बलिदानम् नृपकोः दत्तमनं चरनम् बहन् वा—*Vishnu Smṛiti*, Chapter X.

(4) *Savara's* Commentaries on *Jaimini* 6. 7. 2. :—राजकीयत्वोक्तत्वे तदधिकं यत् बली इति यदा बहन्तां मन्त्रादीनां रक्षणेन निर्दिष्टस्य कदाचित् भक्षणम् ।

And in this he only sums up the views of the earlier sages. Thus *Baudhayana*, for instance, says that "the king gets the sixth share as he protects the subjects" (1). *Yajnavalkya* repeats the same idea in the verses noted below (2), and such is also the view expressed by *Parasara* (3). *Narada* declares that the 'revenue which under the name of 'share' is derived by the king from land and other sources is ordained his remuneration for protecting his subjects (प्रजापालन वेतनम्) (4). The *Mahavarata* also speaks of the royal share along with the other taxes as the wages (वेतनम्) realised for services rendered by the king (5). There can be little doubt that what was originally given as a voluntary offering (दान) came by custom to be soon regarded as compulsory for the services rendered by the king, and 'Vali' (वलि) sometimes came to be identified with *kara* (कर) or tax, and sometimes used technically as the share due to the king (राजवाञ्छमानः) And *Jaimini* in his *Mimansa* distinctly states that the share of the produce received by the king from the cultivator of the soil is as in modern terminology, a tax and not rent (6) and this is also borne out by the texts already referred to.

From what is stated above it is clear that ownership or such ownership as was within the conception of the time was *with the community* which existed before kings and sovereigns (7). The Greek notices (8) in which it would be dangerous to put much trust vary in their statement. In part they speak of the rent being paid and declares only the king and no private persons could own land, while in part they refer to the taxation of land. The evidence so far as it goes of other Aryan peoples does not support the theory of the original

Cultivator's
ownership.

(1) *Baudhayana* Prasna I. Adhyaya 10. Kandika 15. Verse 1. Buhler's Translation 192 :— "षड्भागं भृतो राजा रक्षेऽप्रजाः ।

(2) *Yajnavalkya*, Bombay Edition 98-99 :— "अरक्षमाना कुर्वन्ति यत्किञ्चित् किलिषं प्रजाः । तस्मात् नृपतेरर्धं यस्मादग्रहात्यसी करान् ॥ 335 पुण्यात् षड्भागमादत्ते स्वायेन परिपालयन् । सर्वदानाधिकं यस्मात् प्रजानां परिपालनं ॥ 337.

(3) *Vrihat Parasara*—अवायुपद्रवं राजा तस्करादिसमुद्भवं । सर्वज्ञे सर्वतो यस्मात् ग्रहात्यसी करान् ।

(4) *Narada Smṛiti*, Chapter XVII; 48 :— "अथ प्रकारादुचितार्द्धवेः षड्भाग-सञ्चितात् । वलि सः तस्य विहितप्रजापालनवेतनम् । "

(5) *Mahavarata, Santi Parva*, Chapter, XXI. 10 :— "वलिषटेन युक्तेन कस्यै नय पराधिपतम् । तन्मन्त्रेण विप्रैश्च वेतनेन चनयामनि ॥

(6) *Jaimini Mimansa* 6, 7, 2. See Hopkins's 'India old and new' 221.

(7) Field's *Landholding and the relation of Landlord and Tenant*, 419 ; Maines 'Village communities', 122.

(8) See *Diodorus* ii. 40; *Arrian's Indica* 11 ; *Strabo*, 703; Hopkins's J.A.O.S., 13, 87 &c.

kingly ownership. Such ownership did not exist as far as can be seen in Anglo-Saxon times (1) nor in Homeric Greece (2) nor in Rome. And there are some English writers who hold that the property in the soil in ancient India vested in the cultivator and not in the king (3).

(1) English Historical Review, VIII 1-7.

(2) Lang's '*Homer and His Age*' 236 &c.

(3) Wilk's '*History of Mysore*,' Vol. I, Chapter V and Appendix, 23; Elphinstone's '*History of India*,' Cowell's Ed. 23.

BERHAMPORE.

Radha Ramon Mookherjee,
Vakil.

REVIEWS.

Sanjiva Row's All India Digest. Criminal. 1836-1915. Second Edition. Vol. I. Law Printing House, Madras, 1915.—This new edition of the All-India Criminal Digest of the late Mr. Sanjiva Row issued in 1910 will be cordially welcomed by the profession. The cases have been brought down to the end of 1915 and it will consequently be no longer necessary to look through any Annual Digest up to that date. The few errors and repetitions which occurred in the 1st Edition have now been removed and cases which had been previously omitted by oversight have been inserted. On the whole there are signs of distinct improvement and the publishers are to be congratulated on the excellent style in which the work has been produced.

Sanjiva Row's All India Civil Court Manual. Imperial Acts, 3rd Edition. Vol. I. Law Printing House, Madras, 1915.

Sanjiva Row's All India Civil Court Manual. Local Acts (United Provinces). Second Edition. Law Printing House, Madras, 1915.

Sanjiva Row's All India Civil Court Manual. Local Acts (Central Provinces). Law Printing House, Madras, 1915.

These three volumes furnish evidence of the continued and well-deserved success of the series of Manuals designed by the late Mr. Sanjiva Row. Each of these volumes make easily accessible to the legal profession the products of the labours of the various Indian Legislatures. The Acts are furnished with brief historical memoirs and brief notes of the leading decisions. They are also now fur-

nished with an analysis of the contents. The volumes are in daily use by members of the profession of all ranks and these that have passed into more than one edition furnish ample proof of their solid worth.

Indian Decisions. New Series. High Court Reports, Bengal. Vol. I.—The handsome volume before us contains a reproduction of the first two volumes of the **Bengal Law Reports**. The original paging has been preserved and short notes have been added indicating the place where a particular case occurs in a contemporary report or has been subsequently approved, dissented from or considered. This will be a great convenience to the profession as the original edition of these reports is out of print and unobtainable, while the unauthorised Bangalore reprint is not quite satisfactory. We observe that the publishers have started with the first volume of the Bengal Law Reports; they have left out the volume known as the Full Bench Rulings, which contains cases earlier than those published in the first volume; in fact it covers the period from 1862—1868, whereas the first volume begins with 1868. We trust that volume will be included in the series.

The Bench and Bar Diary, 1916. Rai M. C. Sarkar Bahadur & Sons. Calcutta, 1916. Price Re. 1.—We are pleased to receive a copy of the above well-known Diary. It contains useful information which a lawyer is frequently in need of.

The Lawyer's Official Diary, 1916, and The Lawyer's Companion Diary, 1916, by The Law Printing House, Madras. These are two handy volumes of Diaries for 1916 which we received from the well-known law-publishers of Madras. Both of them contain important provisions of certain enactments, such as the Code of Civil Procedure, the Criminal Procedure Code, the Limitation Act, the Registration Act, the Stamp Act, which are of every day use to the Legal Practitioners. We note also another special feature that several pages have been added in the Diary for the first three months of 1917. We hope they will be welcomed by the members of the profession.

Constitution of the High Court Benches.

The following is the constitution of the different Benches of the High Court :—

Appeals from Original Side—Sir Lancelot Sanderson Kt., K. C. Chief Justice, Justice Sir John Woodroffe and Justice Sir Asutosh Mookerjee.

Original Side—Mr. Justice Fletcher, Mr. Justice Chaudhuri and Mr. Justice Greaves.

Groups I (24-Perghs, Nadia, Jessore, Khulna, Murshidabad) and **II.** (Burdwan, Hooghly, Bankura, Midnapur, Birbhoom) and Privy Council Department—Mr. Justice Sir Herbert Holmwood and Mr. Justice Imam.

Group III (Rajshahi, Rangpur, Dinajpur, Jalpaiguri and Darjeeling, Pabna and Bogra, Tippera, Noakhali, Chittagong)—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

Group IV (Dacca, Faridpur, Bakarganj, Mymensingh, Assam Valley Districts, Sylhet, Cachar)—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

Group V (Darbhanga, Purnea, Bhagalpur and Mongyr, Saran, Muzaffarpur and Champaran.)—Mr. Justice Sharfuddin and Mr. Justice Roe.

Group VI (Patna, Shahabad, Gya, Cuttack, Chotanagpur, Manbhum-Sambalpur)—Mr. Justice Chapman and Mr. Justice Mullick.

Second appeals of the value of Rs. 1000 and under, of all the Groups :—Mr. Justice Newbould.

Criminal Bench—Mr. Justice Chitty and Mr. Justice Walmsley.

The Calcutta Law Journal.

VOL. XXIII. } CALCUTTA, FEBRUARY, 1 & 16, 1916. { NOS. 3 & 4.

PATNA HIGH COURT.

Letters Patent.

The following notification has been issued in connection with the Letters Patent of the Patna High Court : —

1. It is intended to include the following clause in the Letters Patent constituting the High Court of Judicature at Patna, relating to the transfer of cases to that High Court on its establishment :—

“And we do further ordain that the jurisdiction of the High Court of Judicature at Fort William in Bengal in any matter in which jurisdiction is by these presents given to the High Court of Judicature at Patna shall cease from the date of the publication of these presents, and that all proceedings pending in the former Court on that date in reference to any such matter shall be transferred to the latter Court.

Provided first that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction

(a) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order other than an order of an interlocutory nature has been passed or made by that Court or in which the validity of any such decree or order is directly in question, and

(b) in all proceedings not being proceedings referred to in paragraph (a) of this clause pending in that Court on the date of the publication of these presents under the 13th, 15th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 32nd, 33rd, 34th, 35th, clauses of the Letters Patent bearing date at Westminster 28th December in the year of our Lord 1865 relating to that Court, and

(c) in all proceedings instituted in that Court on or after the date of the publication of these presents with reference to any decree or order passed or made by that Court ; provided secondly that if any question arises as to whether any case is covered by the first proviso to this clause the matter shall be referred to the Chief

Justice of the High Court of Judicature at Fort William in Bengal, and his decision shall be final."

2. It is the intention that the new Patna High Court will commence its sittings on the 1st March, 1916.

By order,

HIGH COURT, Calcutta.
The 2nd February, 1916.

H. M. VEITCH,
Registrar.

LAND TENURE IN ANCIENT INDIA.—(Contd.).

Ownership was common in ancient times.

The next point to be considered is whether the land belonged to individuals in *separate* ownership, or to a body of individuals or families, or to the community as a whole in *common*. In recent times archaic institution of property has been the subject of careful examination by the jurists of the Historical school. The chief of them—Sir Henry Maine—is of opinion that "the oldest discoverable forms of property in land were forms of *collective* property and separate property has grown out of collective property or ownership in common (1)." Some authorities are of opinion that in India in ancient times all *land was held in common by the village communities*, as is still the case in many of its parts, and that this might perhaps have been the general rule, subject perhaps to the exception that some individuals might have possessed property by grants of land from the villagers, or of the king's share of the produce by a royal grant from the king (2). This opinion finds an important support or corroboration from the actual observation of a foreigner, who came to India in the reign of Alexander the Great. In 325 B. C. Nearchus, the admiral of Alexander, while sailing down the Indus, observed that *families cultivated the soil in common* (3). The families mentioned here evidently refers to the *joint families* which formed the units of the larger group known as the *village-community* spoken of above. But the casual observation of a foreigner, quite ignorant of

(1) Maine's *Village Communities in East and West*, 76-77, 61.

(2) Elphinstone's *History of India*, 9th Edition 25.

Field's *Land Tenure and relation of landlord and tenant*, 419 etc.

(3) Max Müller's *India—What can it teach us?* 48, 207.

Elphinstone's *History of India*, 9th Edition, 259-260.

the manners and customs of the people, can carry but little weight and we must seek for other, better evidence.

It has been said that the political unit or 'the social cell' in India has always been, and, in spite of repeated foreign conquests, is, still the *village-community* (1). Conquests and revolutions seem to have swept over it without disturbance or without displacing it (2). To quote the classic description of Lord Metcalfe:—"They seem to last where nothing else lasts. Dynasty after dynasty tumbles down; revolution succeeds to revolution; Hindoo, Pathan, Mogul, Mahratta, Sikh, English are all masters in their turn; but village-communities remain the same" (3).

Village communities.

But whatever the social and political significance of these village-communities might have been, in India they played *no part in the growth and development of the proprietary rights in the land* which in the opinion of Sir Henry Maine and others of his school, it did in other countries. Even in so early a period as the *Vedic* age the village does not appear to have been a unit for legal purposes and it can hardly be said to have been a political unit. The *Vedic* literature tells us very little about the social economy of the village. There is *nothing to shew that the community as such held the land*. There is no trace in it of *communal* property in the sense of ownership by a community of any sort, nor is there any mention of communal cultivation. What little evidence there is indicates that *individual tenure* of land was known and *individual property* in land seems also to have been presumed. The precise nature of the ownership is of course not determined by the expression '*individual ownership*,' but in effect, though not in law, it presumably meant *tenure by a family rather than by an individual person* (4). It is therefore not a matter of surprise to us that ancient law books—the *dharma sutras* and the *dharma sastras* which come later in order of time,—make no reference to these communities; nor that do we find any of these works recording as a fact that in India at any time the '*gramas*' or villages were the proprietors in common of the lands with which the people of the villages were connected. There is therefore no

Not owners in ancient India.

(1) Max Muller's *India—What can it teach us?* 47.

(2) Maine's *Ancient Law*, 261.

(3) *Report of Select Committee of House of Commons on affairs of East India Company*, dated August 16th, 1882, Appendix.

(4) MacDonell and Keith's '*Index of Vedic Names and subjects under urvara kshetra and Grama*': Jolly '*Recht Und Sitte*' 93: Hopkin's *Journal of the American Oriental Society*, 13, 78, 128: Baden Powell's *Indian Village Communities and Village Communities in India*: Zimmer *Altindisches Leben*, 236: Mrs. Rhys David's *Journal of the Royal Asiatic Society* (1901) 180.

reason to believe that there was any communal idea or the idea of common or joint ownership of land current among the members of any village community. Of course one community had lands and land-marks distinct from those of others, but each family had rights in the land in its occupation well recognised and distinct from that of another.

Village distinct and separate unit.

But although we do not find in any passage in Sanskrit text-books any direct allusion to the village co-parcenary, we do find in them scattered texts which evidence the existence and continuance of the village system as an integral and most important element in the social and political organisation of the days of *Manu* and *Yajnavalkya*, for instance. Such an indication is furnished by the law as to dispute between two villages on the question of boundaries as promulgated by *Manu* and other law-givers (1). There we find that each village is regarded as *distinct and separate unit*, having well defined limits or land-marks and boundaries, and a raised earth-work called '*Setu*' ran along the boundary lines between the lands respectively belonging to two villages. Reservoirs, drinking places, elongated tanks, water-courses, and temple of gods are constructed at the place where the boundaries meet (2). In some respects also the natives of each village formed a *unit in the eyes of the law*. Thus certain taxes had to be paid by them collectively and if stolen cattle could be traced to a village all the inhabitants bore the joint responsibility (3). Within each village there may have been *individual property established or property owned by joint families*; but at the same time we cannot but concede that each village was regarded as a unit holding its own land, disputing with another similar unit as to whether a particular plot of land fell within the ambit of the one or the other. But while within a particular village the *joint families were the owners of distinct plots of arable lands*, there is evidence in our ancient lawbooks of the common ownership by the entire village community of other lands. Thus each village had its *grazing ground* for the cattle of all its residents and cultivators. It was common property of the entire village and none of the villagers had the right to appropriate any part of it for purposes of cultivation. *Manu* has laid down that

Evidence of common ownership of village & grazing field.

(1) *Manu*, Chapter VIII : *Yajnavalkya*, Chapter II : *Narada*, Chapter XIX : *Vrihaspati*.

(2) *Manu*, Chapter VIII, 248.

“तद्वामान् इवामानि वाजप्रवचनानि च ।

वीमातद्विषु ज्ञान्वावि इवामानानि च ॥”

(3) Barnett's '*Antiquities of India*', Chapter III., 105.

grazing grounds are the common property of the village, and the people encroaching upon them are liable to punishment (1); and *Yajnavalkya* also lays down substantially the same rule (2). This was so even as early as the *Vedic* age when it was called *khila* or *khilya*, as surrounding the plough land (3). The village land appears also to include adjoining *forest tracts* over which the entire village has a common right (4). Besides these, there were the *watercourse*, the *village temple*, and the village gods which were the communal properties of the entire village. And even with regard to the arable land occupied or cultivated by the villagers which was considered to be the separate property of the joint families, we find a trace of the communal right of the village in the rule that such lands *could not be alienated without the consent of the entire villagers* (5). But these and similar rights which the village communities had can hardly be construed as showing that at any stage of their history the entire land occupied and cultivated by the villagers was considered to be *common* property.

Of Water-course,
temple and gods.

The village-community is an *organised society*, and besides providing for the management of the common fund, it seldom fails to provide, by a complete staff of functionaries, for government, for police, for the administration of justice, and for the apportionment of taxes and public duties (6). It is a little republic having nearly everything that it wants within itself and almost independent of any foreign relations (7). It is *self-acting* and includes in fact a nearly complete establishment of occupations and trades for enabling it to continue its collective life without assistance from any person or body external to itself. It has its headman or council of elders exercising quasi-judicial, quasi-legislative power, a village police, and several families of hereditary traders—the black-smith, the harness-maker, the shoe-maker, the potter, the barber and so on. The Brahmin also is found for the performance of ceremonies, and even the dancing girl for attendance at festivities. There is invariably a village accountant who keeps a record of the village

Village organised
and self-acting
Society.

(1) *Mann*, Chapter VIII 237.

(2) *Yajnavalkya*, Chapter II, 169.

“यानिच्छन्ना नो प्रचारी भूमि राजवर्गेन वा”

(3) See Pischel *Vedische Studien* 2, 204-207.

(4) *Mann*, Chapter VIII 260.

(5) Anonymous Text quoted in *Mitakshara*, Chapter I, Section 1, Para. 31.

“अथान्नं यानि यान्नं दद्यादावुपनेन च । हिरण्योदकदानेन च कुम्भिन्यन्ति मेदिनी ॥”

(6) *Maine's Ancient Law*. 262.

(7) Lord Metcalfe's Description.

Aggregation of
joint families.

produce showing particulars as to its distribution. But the person exercising these hereditary employments is really a *servant of the community as well as one of its component members*. He is generally paid by the allotment to his family of a piece of cultivated land in hereditary possession. The demands of those who produce wires are limited by a customary standard of price (1). The village-community in its social and economic aspects is but an *aggregation of families each of which has its private domain which it cultivates* for its own special benefit, and the chief sign of the collective ownership of the community that is found is the waste land which is held in common by the various families. It has the double aspect of families united by the assumption of common kinship and of a company of persons exercising joint-ownership over land. As an assemblage of families, it is an *organised society of joint families*; as a community of co-owners, it is an *assemblage of co-proprietors*. But the proprietor is the family not the community or the individual.

(1) Maine's *Village Communities in East and West*, 125-126.

BERHAMPORE.

Radha Romon Mookerjee,

Vakil.

(To be continued.)

The Calcutta Law Journal.

VOL. XXIII. }

CALCUTTA, MARCH 1, 1916.

{ No. 5.

SIR HERBERT HOLMWOOD.

We have much pleasure in presenting to our readers a portrait of the Hon'ble Justice Sir Herbert Holmwood who is about to proceed on leave preparatory to his retirement from the High Court Bench.

Sir Herbert Holmwood was born on the 15th May, 1856, and was educated at Uppingham School. He was appointed to the Indian Civil Service after the competitive examination of 1877 and arrived in this country on the 16th December, 1879. After the usual period of service, first as Assistant and then as Joint Magistrate and Collector, he became Inspector-General of Registration and Registrar-General of Bengal in 1890; he administered the department with great efficiency, and subsequently in 1894 wrote a valuable work on the Law of Registration, of which a revised and enlarged edition was recently published. He became a District and Sessions Judge in 1893 and for a long spell of years continued as such in Behar Districts till his appointment as an Officiating Judge in the High Court in 1905. He was confirmed as a High Court Judge in 1907. His judicial work has throughout been characterised by an earnest desire to do substantial justice and to prevent the accumulation of arrears. He has been in charge of the English Department since the retirement of Sir Cecil Brett and has thus been brought into close touch with members of the Provincial Judicial Service who have organised a fitting farewell reception in his honour in token of their gratitude to him for his steady endeavour to promote the welfare of the service. The social, literary and artistic activities of Sir Herbert Holmwood have been many-sided, and in these he has been ably assisted by Lady Holmwood, the daughter of Mr. E. T. Atkinson, formerly Accountant-General, Bengal. Lady Holmwood, like her father and her husband, has been a true friend of India and her people. Sir Herbert Holmwood has been a Fellow of the Calcutta University since 1912, and has taken an active interest as a member of

the Faculty of Law and of the Board of Studies in Law. Sir Herbert Holmwood received the honour of Knighthood on New Year's Day, this year, an honour which his many friends and admirers had long expected would be conferred on him.

BABU UMAKALI MOOKERJEE.

We deeply regret to record the sudden and unexpected death of Babu Umakali Mookerjee which took place on the night of Saturday, the 12th February. For many years past he had deservedly occupied an honoured place in the foremost rank of the Vakil Bar and his loss will not be easily filled. He was associated with us from the very foundation of this Journal and was ever ready to give us the benefit of his ripe experience. We shall in a future issue publish his portrait with a brief notice of his career.

LAND TENURE IN ANCIENT INDIA.

Joint family
owner.

Thus whatever might be the state of things in other countries, in India, the *joint family*, or the family joint in food, worship and estate, has always been the unit of society from the dawn of its history down to our own days. The Aryan people, moved in families, colonised as well as conquered the country (1). And even so early as the Vedic Age it is the joint families that we meet with as the unit of the Aryan Society of the time (2). Each of these families had its own piece or pieces of land for homestead and cultivation; and the family was the owner thereof. The common grazing ground, the common water-course, the village temple, and the village Gods were communal property in which the families were interested in common, but beyond that there seems to have been no unity of proprietorship. Each family cultivated its own lands,

(1) Maine's *Village Communities in East and West*, 75: Campbell's *Cobden Club Essay*, 161: Fifth Report of Select Committee of House of Commons on affairs of E. I. Co., Vol. II, 678: Evidence of Fortescue before Select Committee of House of Lords (1830), 589.

(2) Bhattacharjee's *Law relating joint Hindu family*.—Tagore Law Lectures (1884-5): 79—80.

as it had done for years, nay for centuries, and, under certain circumstances, the interest which they had in the land was transferable. The family could sublet the land or get it cultivated by hired labourers. There were restrictions, no doubt, but those imposed were not of a character that would indicate any detraction from proprietary right. The restrictions were for the convenience of the neighbouring holders of land or other members of the community. They were in the nature of the right of pre-emption (1).

The joint family is a corporate body of which the members are individuals. The village community is a corporative body of which the members are families (2). The co-shares in many of these village communities are persons who are *actually descended from a common ancestor*. That the village is primarily an association of kinsmen united by family tie is apparent from the history of the Aryan conquest of the country. That race moved in families and colonised as well as conquered the country, and the joint family with its development gradually formed a village. And, according to the law governing the joint family, the son is a *co-owner* of the family property with his father. As soon as a son is born he acquires a vested interest in the family property, and on attaining the years of discretion he is even, in certain contingencies, permitted by the letter of the law to call for a partition of the family estate. Though divisible theoretically, as a matter of fact, however, division rarely takes place even at the death of the father, and many generations constantly succeed each other without a partition taking place, and the property constantly remains undivided for several generations, though every member of every generation has a legal right to an undivided share in it. Thus the *family in India has a perpetual tendency to expand into the village-community* (3). It is evident that an actual community of descent must depend upon mere accident. If a family settled on an unoccupied district, it might spread out till it formed one or several village communities. The same result might happen if a family become sufficiently powerful to turn out its neighbours or reduce them to submission (4).

Expanded into
village community.

But although the community might be founded by a single assemblage of blood-relations, men of *alien* extraction have always, from time to time, been *engrafted* on it. Struggle for existence with man,

Introduction
of strangers into
community.

(1) Mitra's Tagore Law Lectures on 'The Land Law of Bengal,' 16.

(2) Mayne's *Hindu Law and Usage*, Chapter VII, section 196.

(3) Maine's *Ancient Law* 228, 261-262 : *Early History of Institutions*, 106.

(4) Mayne's *Hindu Law and Usage*, Chapter VII, section 199.

Tradition of
common descent.

savage enemies and nature forced the amalgamation of strangers with the village group and united them in the same brotherhood. And, though the strangers were thus admitted into the brotherhoods, yet in all of them either the *tradition* is preserved, or the assumption is made, *of an original common parentage* (1). Thus in many cases the members of the community profess a common descent for which there is probably no foundation, and in some cases it is quite certain there can be no common descent as they are of different castes or even of different religions. But it is a well-known fact that in India the mere association produces a belief in a common origin unless there were circumstances which make such an identity plainly impossible (2). Thus the village-community is not necessarily an assemblage of blood-relations, but *either* such an assemblage *or* a body of co-proprietors formed on the model of an association of kinsmen (3).

Assimilation of
strangers into
village group.

It was the struggle for existence that first led the Aryan group to submit to an *amalgamation of the strangers with the brotherhood*. When a stranger would first come in he would be looked upon by the community with a jealous eye as an interloper. But the struggle for existence would compel them to seek for his help and that jealousy would gradually fade. Besides they had more lands at the time at their command than they could themselves cultivate and they naturally allowed strangers to cultivate them. But while the land was plenty and many villages in progress, no man would undertake to clear a spot unless he was to enjoy it for ever. And when these immigrants offered unmistakable proof of settling as permanent inhabitants in the village, building, clearing and establishing themselves as members of the village-community and ready to undertake a share in the responsibility attaching to that position (4), the distinction between them and the original settlers would gradually grow indistinct, and they would be *absorbed* into them. But so long as the assimilation did not take place or owing to change of circumstances could not, these immigrants would only be reckoned as mere cultivators. *Intention to settle* in the village was no doubt the criterion to admit stranger into the community and that intention in a primitive age had to be gathered from some length of possession. Accordingly those who had settled in the village for more than one generation were generally con-

(1) Maine's *Ancient Law* 262—263.

(2) Mayne's *Hindu Law and Usage*, Chapter VII, section 199.

(3) Maine's *Ancient Law*, 264.

(4) Maine's *Village Communities in East and West*, 125—126.

sidered to have shewn that intention (1). Thus the immigrants, when they became *permanent settlers*, were absorbed into the community but when they were mere sojourners they were not assimilated into the village group.

If it was the urgency of the struggle for existence that forced the community to receive strangers into the brotherhood, there can be little doubt that when with the establishment of settled government, or from other causes the struggle for existence ceases to trouble it, the community would refuse to receive the alien population within its pale. As Sir Henry Maine points out:—"During the primitive struggle for existence the communities were expansive and elastic bodies and these properties may be perpetuated in them for any time by bad government. But tolerably good government takes away from them their absorptive power by its indirect effects" (2), and the village communities then become close corporations. As soon as this point is reached there is no doubt that any *new comers* would only be admitted on terms of *paying rent for the use and occupation of land* (3). Besides, when the original settlers were numerous and their descendants increased in numbers sufficient to cultivate all their culturable lands, the cultivators would naturally be found to be proprietors. But when the land of the village was too extensive to be cultivated by the first settlers or their descendants, strangers would be introduced as *tenants* (4); for the original settlers finding that they had more good land than they themselves could cultivate would endeavour to make a profit out of it through the labours of others. No method seemed easier than to assign it to a person who should engage to pay the Government's proportion with an additional share to the community. But while land was plenty, and many villages in progress, no man would undertake to clear a spot unless he was to enjoy it for ever; and hence *permanent* tenants would arise (5). When there was plenty of unoccupied land, and population was sparse, the *competition was not amongst tenants for lands, but amongst the proprietors for raiyats*. Tenants once induced to settle in the village were thus fostered; and when the son was able to step into the father's place, the arrangement suited both parties too well for any doubt to be raised as to the

Origin of tenancy.

Permanent and temporary tenants.

(1) Rawlinson's *Land Revenue*, 15, 41.

(2) Maine's *Village Communities in East and West*, 168.

(3) *Ibid*, 179.

(4) Field's *Introduction to Regulation of the Bengal Code*, 31.

Ibid *Land-holding and Relation of Landlord and Tenant*.

(5) Elphinstone's *History of India*, 9th Edition, 75.

course to be pursued on the death of a tenant (1). When a share of the common rights passed into the hands of females or of persons whose caste prevented them from personally performing the manual labour of cultivation, a similar practice would be adopted as to land already brought under tillage which would thus be made over to some one who would undertake to cultivate it, to discharge the Government dues, and to give a share of the produce to those on whose behalf he cultivated. *Temporary* tenants would thus be created (2). But such tenants would only be available from the adjoining village where there was no land available to them for cultivation. They were thus residents of another or neighbouring village, who could not obtain in their own village as much land as they were able to cultivate (3).

Former assimilated into community, latter were not.

These tenants, though at first strangers to the brotherhood, would be absorbed into the community when they once for all settled in the village, but so long as they were mere sojourners they were not assimilated into the village group. As Sir George Campbell points out:—"a distinction was made between raiyats who had settled as *permanent inhabitants* of the village and had given pledges by building and clearing and establishing themselves and accepting a share of the common obligations, and the *temporary sojourners* or cultivators from another village" (4). The former had all the rights and privileges of the community extended to them on condition of their cultivating the land held by them and paying rent due on account of the same. It was the *residence in the village* that gave them the status of the member of the village community with all his rights and liabilities.

Residence in Village gave them status.

We have already seen that although the village community was primarily an association of kindred, strangers were always engrafted on it. In the course of amalgamation of the strangers with the brotherhood, the community came to be divided into *several parallel social strata*. There are, first, a certain number of families who are traditionally said to be descended from the founder of the village. Below them, there are others, distributed into well ascertained groups. The brotherhood, in fact, forms a sort of hierarchy, the decrees of which are determined by the order in which the various sets of families were amalgamated with the community. The tradition is clear enough as to the succession of the groups and is probably the representation of a fact. The length of the

Division of community into several parallel strata according to order of assimilation.

(1) See Field's *Introduction to Regulation of the Bengal Code*.

(2) See (1) above, 31.

(3) See (1) above, 33.

(4) Campbell's *Cobden Club Essay*, 165.

intervals of time between each successive amalgamation is also sometimes given which is always enormous. The superiority of each group in the hierarchy to those below it bears undoubtedly some *analogy to the superiority of ownership in the land* which all alike cultivate. And, to translate the relations of these component sections to one another into proprietary relations has been a perplexing problem to Anglo-Indian administrators. It is in the highest degree improbable that the various layers of the little society were connected with anything like systematic *payment of rent*. It was the urgency of the struggle for existence that forced groups of men to submit to that amalgamation of strangers with the brotherhood which seems at first to be forbidden by its very constitution. The utmost available supply of human labour at first merely extracts from the soil what is sufficient for the subsistence of the cultivating group, and it is the extreme value of the new labour which condones the foreign origin of the new hands which bring it. No doubt there comes a time when this process ceases, when the fictions which conceal it seem to die out, and when the village community becomes a close corporation. As soon as this point is reached there is no doubt that any new comer would only be admitted on terms of paying money or rendering service for the use and occupation of land (1), that is to say, *as tenants*.

Their relation with each other.

There can be little doubt that the rights of these tenants were originally very uncertain and indefinite. But in course of time they came to acquire certain positive and definite rights by custom—the custom of many centuries and having at least as much force as any written law. For in the stage of society and of the ideas in which they grew up, custom was the main law : no doubt it was a law without the definite sanction of law, as in a more advanced state, but it was binding and effective notwithstanding. A right by custom, although in one sense only a moral claim, until clearly recognised by express law, would nevertheless be equivalent to a legal right. Hereditary rights of occupancy have been claimed for them ; while, on the other hand, it has been contended that they have no rights whatever and could be ousted at the will of those whose lands they cultivated. The true state of things, as pointed out by Dr. Field, seems to be this. When there was plenty of unoccupied land and population sparse, the competition was not amongst tenants for lands, but amongst proprietors for tenants. Tenants once induced to settle in the village were fostered, and where the son was able to step into the father's place, the arrangement suited both parties too

Rights of permanent tenants.

Protection from eviction.

(1) Maine's *Village-Community in East and West*, 176—179.

well for any doubt to be raised as to the course to be pursued upon the death of a tenant. Non-fulfilment of the conditions on which the land was cultivated, non-discharge of the King's share of the produce, or non-delivery of the proprietor's share of the same, rendered it necessary to remove a tenant. And in a state of society in which new tenants did not often present themselves, the *practical exercise of the power of ousting these tenants*, if it were possessed by the proprietor, was *not frequent*. Thus, notwithstanding occasional instances of ouster, it gradually became usual, in the language of a later stage of development, *not to evict these raiyats as long as they paid their rents* (1).

(1) Field's *Introduction to Regulations* 30—31 : *Ibid Landholding*—424.

BERHAMPORE.

Radharomon Mookerjee.
Vakil.

The Calcutta Law Journal.

VOL. XXIII. }

CALCUTTA, MARCH 16, 1916. }

No. 6.

LETTERS PATENT CONSTITUTING THE HIGH COURT OF JUDICATURE AT PATNA.

Dated the 9th February, 1916.

George the Fifth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, To all whom these Presents shall come, greeting : Whereas by an Act of Parliament passed in the Twenty-fourth and Twenty-fifth Years of the Reign of Her late Majesty Queen Victoria, and called the Indian High Courts Act, 1861, it was, amongst other things, enacted, by section one, that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William ;

and, by section two, that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who should be selected from among persons qualified as in the said Act was declared ;

and, by section eight, that upon the establishment of such High Court as aforesaid the Supreme Court and the Court of Sadar Diwani Adalat and Sadar Nizamat Adalat at Calcutta, in the said Presidency, should be abolished ;

and, by section nine, that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of Justice in the said Presidency, as Her Majesty might by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations, as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency town, as might be prescribed thereby ; and that, save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the

Recital of Act
24 and 25 Vict.
C. 104.

legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever, in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts :

And whereas it was further declared by section sixteen of the said recited Act that it should be lawful for Us by Letters Patent to erect and establish a High Court of Judicature in and for any portion of territories within Our Dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts established at the Presidencies of Fort William in Bengal, of Madras, and of Bombay, as We from time to time might think fit and appoint ; and that it should be lawful for Us, by such Letters Patent, to confer on any new High Court which might be so established any such jurisdiction, powers and authority, as under the same Act was authorized to be conferred on or would become vested in the High Court established in any of the said Presidencies ; and that, subject to the directions of the Letters Patent, all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges of such Courts, and to the Governor-General or Governor of the Presidency in which such High Courts were established, should, as far as circumstances might permit, be applicable to any new High Court which might be established in the said territories, and to the Chief Justice and other Judges thereof, and to the Persons administering the Government of the said territories :

Recital of
establishment of
High Courts at Fort
William and
Allahabad.

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Fourteenth day of May, in the Twenty-fifth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty two, did erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of of the Presidency of Fort William aforesaid, and did constitute that Court to be a Court of Record :

And whereas Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-eighth day of December, in the Twenty-ninth Year of Her Reign, in the Year

of Our Lord One thousand eight hundred and sixty-five, did revoke the said Letters Patent bearing date the Fourteenth day of May in the Year of Our Lord One thousand eight hundred and sixty-two, but notwithstanding that revocation did continue the said High Court of Judicature at Fort William in Bengal and declared that the Court should continue to be a Court of Record :

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Seventeenth day of March in the Twenty-ninth year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-six, did erect and establish a High Court of Judicature for the North-Western Provinces, which said Court is situated at Allahabad in the Province of Agra and is now called the High Court of Judicature at Allahabad, and did constitute that Court to be a Court of Record :

And whereas by an Act of Parliament passed in the First and Second Years of Our Reign, and called the Indian High Courts Act, 1911, it was enacted, amongst other things, by section one, that the maximum number of Judges of a High Court of Judicature in India, including the Chief Justice, should be twenty ;

Recital of Act 1
& 2 Geo. 5, C. 18.

and, by section two, that Our power under section sixteen of the Indian High Courts Act, 1861, might be exercised from time to time, and that a High Court might be established under the said section sixteen in any portion of the territories within Our Dominions in India, whether or not included within the limits of the local jurisdiction of another High Court ; and that, where such a High Court was established in any part of such territories included within the limits of the local jurisdiction of another High Court, it should be lawful for Us by Letters Patent to alter the local jurisdiction of that other High Court, and to make such incidental, consequential and supplemental provisions as might appear to be necessary by reason of the alteration of those limits :

And whereas the said Indian High Courts Acts, 1861 and 1911, have been repealed and re-enacted by an Act of Parliament passed in the Fifth and Sixth Years of Our Reign, and called the Government of India Act, 1915 :

Recital of Act 5 & 6
Geo. 5, C. 61.

And whereas certain territories formerly subject to and included within the limits of the Presidency of Fort William in Bengal were, by Proclamation made by the Governor-General of India on the Twenty-second day of March in the Year of Our Lord One thousand nine hundred and twelve, constituted a separate Province, called

Recital of creation
of Province of
Bihar and Orissa.

the Province of Bihar and Orissa, and are now governed by a Lieutenant-Governor in Council :

Establishment of
High Court at
Patna.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our Heirs and Successors, erect and establish, for the Province of Bihar and Orissa aforesaid, with effect from the date of the publication of these presents in the Bihar and Orissa Gazette, a High Court of Judicature, which shall be called the High Court of Judicature at Patna, and We do hereby constitute the said Court to be a Court of Record.

Constitution and
first Judges of the
High Court.

2. And We do hereby appoint and ordain that the High Court of Judicature at Patna shall, until further or other provision be made by Us, or Our Heirs and Successors, in that behalf in accordance with section One hundred and one of the said recited Government of India Act, 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Edward Maynard Des Champs Chamier, Knight, and the six other Judges being Saiyid Shurf-uddin, Esquire, Edmund Pelly Chapman, Esquire, Basanta Kumar Mullick, Esquire, Francis Reginald Roe, Esquire, the Hon'ble Cecil Atkinson, and Jowala Persad, Esquire, being respectively qualified as in the said Act is declared.

Declaration to be
made by Judges.

3. And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Patna, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Lieutenant-Governor in Council may commission to receive it :—

"I. A. B., appointed Chief Justice (or a Judge) of the High Court of Judicature at Patna, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

4. And We do hereby grant, ordain and appoint that the High Court of Judicature at Patna shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Patna." And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions

Seal.

of section One hundred and five of the Government of India Act, 1915 ; and We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby, authorised and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession.

5. And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at Patna shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court.

Writs, etc. to
issue in name of
the Crown, and
under seal.

6. And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Patna from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant-Governor in Council, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Lieutenant-Governor in Council and shall be either confirmed or disallowed by the Lieutenant-Governor in Council. And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively, and as the Lieutenant-Governor in Council, subject to the control of the Governor-General in Council, may approve of : Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices ; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor-General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules.

Appointment of
officers.

Admission of Advocates, Vakils and Attorneys.

Powers of High Court in admitting Advocates, Vakils and Attorneys.

7. And We do hereby authorize and empower the High Court of Judicature at Patna to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court may seem meet ; and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

Powers of High Court in making rules for the qualifications, etc., of Advocates, Vakils and Attorneys.

8. And We do hereby ordain that the High Court of Judicature at Patna shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-Law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys-at-Law ; and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor.

Civil Jurisdiction of the High Court.

Extraordinary original civil jurisdiction.

9. And We do further ordain that the High Court of Judicature at Patna shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

Appeal to the High Court from Judges of the Court.

10. And We do further ordain that an appeal shall lie to the High Court of Judicature at Patna from the judgment (not being an order made in the exercise of revisional jurisdiction in a case which has been called for by the said Court, and not being a sentence or order passed or made in the exercise of criminal jurisdiction) of one Judge of the said High Court, or of one Judge of any Division Court constituted in pursuance of section One hundred and eight of the Government of India Act, 1915, and that an appeal shall also lie to the said High Court from the judgment (not being an order or sentence as aforesaid) of two or more Judges of the said High Court, or of any such Division Court, wherever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being ; but that the right of appeal from other judgments of Judges of the

said High Court, or of any such Division Court, in such case shall be to Us, Our heirs or successors, in Our or their Privy Council, as hereinafter provided.

11. And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Civil Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India.

Appeal from other Civil Courts in the Province of Bihar and Orissa.

12. And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Province of Bihar and Orissa as that which was vested in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents.

Jurisdiction as to Infants and Lunatics.

Law to be administered by the High Court.

13. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Patna in the exercise of its extraordinary original civil jurisdiction, such law or equity shall, until otherwise provided, be the law or equity which would have been applied to such case by any local Court having jurisdiction therein.

By the High Court in the exercise of extraordinary original civil jurisdiction.

14. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Patna to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

By the High Court in the exercise of appellate jurisdiction.

Criminal Jurisdiction.

15. And We do further ordain that the High Court of Judicature at Patna shall have ordinary original criminal jurisdiction in respect of all such persons within the Province of Bihar and Orissa as the High Court of Judicature at Fort William in Bengal had such criminal jurisdiction over immediately before the publication of these presents.

Ordinary original criminal jurisdiction of the High Court.

16. And We do further ordain that the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction

Jurisdictions as to persons.

tion, shall be empowered to try all persons brought before it in due course of law.

Extraordinary
original criminal
jurisdiction.

17. And We do further ordain that the High Court of Judicature at Patna shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any magistrate or other officer specially empowered by the Government in that behalf.

No appeal from
High Court
exercising original
jurisdiction.

18. And We do further ordain that there shall be no appeal to the High Court of Judicature at Patna from any sentence or order passed or made by the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

Court may reserve
points of law.

High Court to
review cases on
points of law
reserved by one or
more Judges of the
High Court.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Patna shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right.

Appeals from other
Criminal Courts in
the Province of
Bihar and Orissa.

20. And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the criminal Courts of the Province of Bihar and Orissa, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India.

Hearing of referred
cases, and revision
of criminal trials.

21. And We do further ordain that the High Court of Judicature at Patna shall be a Court of reference and revision from the criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers in the Province of Bihar and Orissa, who were, immediately before the publication of these presents, authorised to refer cases to the High Court of Judicature at Fort William in Bengal, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Province of Bihar and Orissa, as were, immediately before the publication of

these presents, subject to reference to or revision by the High Court of Judicature at Fort William in Bengal.

22. And We do further ordain that the High Court of Judicature at Patna shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

High Court may direct the transfer of a case from one Court to another.

Criminal Law.

23. And We do further ordain that all persons brought for trial before the High Court of Judicature of Patna, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Offenders to be punished under Indian Penal Code.

Admiralty Jurisdiction.

24. And We do further ordain, that the High Court of Judicature at Patna shall have and exercise in the province of Bihar and Orissa all such civil and maritime jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions as was so exercisable by the High Court of Judicature at Fort William in Bengal.

Civil.

25. And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such criminal jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, or otherwise in connection with maritime matters or matters of prize.

Criminal.

Testamentary and Intestate Jurisdiction.

26. And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Province of Bihar and Orissa by the

Testamentary and intestate jurisdiction.

High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate; provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial Jurisdiction.

Matrimonial
Jurisdiction.

27. And We do further ordain that the High Court of Judicature at Patna shall have jurisdiction, within the Province of Bihar and Orissa, in matters matrimonial between Our subjects professing the Christian religion: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Province, which is lawfully possessed of that jurisdiction.

Powers of Single Judges and Division Courts.

Single Judges and
Division Courts.

28. And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Patna, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but, if the Judges be equally divided, then the opinion of the senior Judge shall prevail.

Civil Procedure.

Regulation of
proceedings.

29. And We do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act, No. V of 1908, passed by the Governor-General in Council, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively.

Criminal Procedure.

Regulation of
proceedings.

30. And We do further ordain that the proceedings in all criminal

cases brought before the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction, shall be regulated by the procedure and practice which was in use in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India ; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal procedure, being an Act, No. V of 1898, passed by the Governor-General in Council, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

31. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the High Court of Judicature at Patna made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal does not lie to the said High Court under the provisions contained in the 10th clause of these presents ; provided, in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees ; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council ; but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Province of Bihar and Orissa, except so far as the said existing rules and orders respectively are hereby varied ; and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Power to appeal in civil cases.

32. And We do further ordain that it shall be lawful for the High Court of Judicature at Patna, at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission

Appeal from interlocutory judgments.

to such party to appeal against the same to Us, Our heirs and successors, in Our or their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

Appeal in criminal
cases.

33. And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Patna, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or successors, in Council, provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Province of Bihar and Orissa.

Rule as to
transmission of
copies of evidence
and other
documents.

34. And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Patna to Us, Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed.

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.

Judges to visit
Orissa by way of
circuit.

35. And We do further ordain that, unless the Governor-General in Council otherwise directs, one or more Judges of the High Court of Judicature at Patna shall visit the Division of Orissa, by way of

circuit, whenever the Chief Justice from time to time appoints, in order to exercise in respect of cases arising in that Division the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the said High Court : Provided always that such visits shall be made not less than four times in every year, unless the Chief Justice, with the approval of the Lieutenant-Governor in Council, otherwise directs : Provided also that the said High Court shall have power from time to time to make rules, with the previous sanction of the Lieutenant-Governor in Council, for declaring what cases or classes of cases arising in the Division of Orissa shall be heard at Patna and not in that Division, and that the Chief Justice may, in his discretion, order that any particular case arising in the Division of Orissa shall be heard at Patna or in that Division.

36. And We do further ordain that whenever it appears to the Lieutenant-Governor in Council, subject to the control of Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the High Court of Judicature at Patna should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly.

Special commissions and circuits.

37. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Patna visit any place under the 35th or the 36th clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Proceedings of Judges on special commission or circuit.

Delegation of Duties to Officers.

38. The High Court of Judicature at Patna may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties.

Power to delegate duties.

Cessation of jurisdiction of the High Court of Judicature at Fort William in Bengal.

39. And We do further ordain that the jurisdiction of the High Court of Judicature at Fort William in Bengal in any matter in which jurisdiction is by these presents given to the High Court of Judicature at Patna shall cease from the date of the publication of these presents, and that all proceedings pending in the former Court

Cessation of jurisdiction of the High Court of Judicature at Fort William over the Province of Bihar and Orissa.

on that date in reference to any such matters shall be transferred to the latter Court :

Provided, first, that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction—

(a) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order, other than an order of an interlocutory nature, has been passed or made by that Court, or in which the validity of any such decree or order is directly in question ; and

(b) in all proceedings [not being proceedings referred to in paragraph (a) of this clause] pending in that Court, on the date of the publication of these presents, under the 13th, 15th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 32nd, 33rd, 34th, or 35th clause of the Letters Patent bearing date at Westminster the twenty-eighth day of December in the Year of Our Lord One thousand eight hundred and sixty five, relating to that Court ; and

(c) in all proceedings instituted in that Court, on or after the date of the publication of these presents, with reference to any decree or order passed or made by that Court :

Provided, secondly, that, if any question arises as to whether any case is covered by the first proviso to this clause, the matter shall be referred to the Chief Justice of the High Court of Judicature at Fort William in Bengal, and his decision shall be final.

Calls for Records, etc , by the Government.

40. And it is Our further will and pleasure that the High Court of Judicature at Patna shall comply with such requisitions as may be made by the Lieutenant-Governor in Council for records, returns and statements, in such form and manner as he may deem proper.

Powers of Indian Legislatures.

41. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section Seventy-one of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under section Seventy-two of that Act, and may be in all respects amended and altered thereby.

In witness whereof We have caused these our letters to be made patent. Witness Ourselves at Westminster the Ninth day of February in the year of Our Lord One thousand nine hundred and sixteen and in the sixth year of our reign.

By Warrant under the King's Sign Manual,
(Sd). SCHUSTER.

High Court to
comply with
requisitions from
Government for
records, etc.

Powers of Indian
Legislatures
preserved.

The Calcutta Law Journal.

VOL. XXIII. }

CALCUTTA, APRIL 1, 1916.

{ No. 7.

Collection of debts of an endowment property on the death of the Shebait or Mohunt.

It is now settled law that no letters of administration can be granted to the successor in office of a *Shebait* or *Mohunt*. A host of judicial decisions have gathered round the point, and the latest pronouncement on the subject appears to be the ruling reported in 20 C. L. J. 307 (*Maharaja Jagadindra Nath Roy v. Madhusudan Das Mohunt*). This decision follows the rule of law as laid down in *Parsania v. Haricharan Das*, 17 C. L. J. 65, which again is founded on the authority of the decision in *Mohunt Jib Lal Gir v. Mohunt Jaga Mohon Gir*, 16 C. W. N. 798. These are all cases under the Probate and Administration Act (V. of 1881) and the law as formulated in the last mentioned case is to the effect that a *mohunt*, or *shebait* as the case may be, is not the owner of the property of endowment, and on his death, a person claiming to be his successor in office, cannot apply under Act V of 1881 for letters of administration, as Sec. 37 of the Probate and Administration Act is intended to apply to property in which the deceased person had ownership so as to constitute it a portion of his estate, although he held it in trust. These decisions are obviously based on a construction of Sec. 37 of the Probate and Administration Act, in view of the principles of representation of the estate of a deceased person, forming the general scheme of the said Act. The case of *Mohunt Jib Lal Gir v. Mohunt Jaga Mohon Gir* was decided with reference to the cases, *Dukharam v. Luchman*, 1. L. R. 4 Calc. 954 and *In re Bhyrub Bharuttee Mohunt* reported in 21 W. R. 340. Both were cases under Act XXVII of 1860, but the last of the two requires special mention. In this case which was heard *ex parte*, their Lordships Kemp and Glover JJ. made the following observations, "Now it is not for a moment contended that these debts were due to the *mohunt* personally : They are due to the endowment and are not debts of a deceased person at all ; and the petitioner as directed by the Judge is entitled to collect these debts, provided that he has been appointed *mohunt* of the endowment, but he is not

entitled to a certificate under the provisions of Act XXVII of 1860." The law in this respect has not been altered by the provisions of the present Succession Certificate Act (VII of 1889), and in the Privy Council case, reported in 1 C. W. N. 497, Lord Hobhouse has laid down the law as formulated in the above case. The underlying principle of all these decisions appears to be that in order to make the provisions of the Probate and Administration Act or the Succession Certificate Act applicable, the property or debts, as the case may be, in respect of which certificate is sought, must have formed a part of the personal estate of the deceased, and not the property dedicated to a deity or for charitable purposes, where there is no real owner to die. Thus it follows that our law contemplates that a successor in law of a person dying intestate must derive his authority from Court for the purpose of administering the estate or for collection of debts of the deceased, whereas a person who is a stranger can, without any such authority, meddle with a property dedicated to religion or charity, simply because he happens to succeed to it by appointment or by operation of law. Where there is such express appointment this rule of law may be harmless, but when the succession opens according to usage, custom or law, as in the case where the principal *chela* or *gurubhai* succeeds, it is curious why the law should favour him with a special privilege. The object of the Succession Certificate Act is said to be "to afford protection to parties paying debts to the representatives of deceased persons," it is not clear why such protection should not be extended to the debtors of a charitable or religious institution. But if the Act were intended merely to levy *death charges* on the successor of a deceased person there could have been very little to add.

Jogendranath Bose, B. L.,
Jessore.

REVIEWS.

The Yearly Digest of Indian and English Cases 1915, by K. Bhashyam Iyengar, B.A., B.L. and R. Narayanaswami Iyer, B.A., B.L., Madras Law Journal Office, 1915. Price Rs. 4.—The Volume for 1915 of this well-known Digest maintains the higher standard of previous issues and is characterised by accuracy, brevity of statement and careful analysis. The section devoted to English cases occupies 44 pages and contains a *resume* of such English cases

reported last year as are likely to be useful to practitioners in this country.

Digest of Indian Case-Law for 1915 by M. B. Doraiswami-engar, Madras, 1916.—We are glad to welcome the new volume of this valuable Digest which has been familiar to the profession now for sixteen years. The excellence which marked the issues for previous years has not only been maintained but improvements have been effected : The original judgments appear to have been examined afresh and the result is that we find a number of important propositions which do not appear in the head-notes given in the Reports. The arrangement is logical and the cross-references numerous. We have no doubt that this Digest will continue to occupy a leading position among works of this class.

Law of Maintenance and Alimony by Labanya Chandra Goswami, Sylhet, 1915. Price Rs. 2-8.—There has been a tendency in recent years in favour of separate monographs on different topics of the law. This has been in a manner rendered necessary by the large accumulation of judicial decisions. The author has made a creditable attempt to bring together the cases on the important topic of maintenance. He has analysed carefully the judicial decisions on the subject and has succeeded in giving a full account of the law as it stands. The cases collected will be found useful to the practitioners and the book may also be profitably consulted by the ambitious student.

Rudiments of Legal Medicine by Jadub Kristo Sen, Calcutta, 1916. Price Rs. 1-8.—Dr. Sen has written an interesting introduction to medical jurisprudence which is not but should be read by our students. The book is in no sense copied from existing treatises ; it refers to number of cases which have come under the notice of the author himself. The plates at the end are interesting as giving the forms of many domestic influence which have been used as offensive weapons. We trust the book will have the wide circulation it deserves.

Provincial Small Cause Court Act by Atul Chandra Ganguli, M.A., B.L. Cranenburgh Law Publishing Press, 1915—This is an useful edition of the Provincial Small Cause Court Act which is not encumbered by too many references to decided cases. The leading decisions are mentioned and their effect briefly stated. The appendix contains a large quantity of information on practical points.

Indian Evidence Act by Mahim Chandra Sarkar, Calcutta, 1915.—The larger commentary on the Indian Evidence Act by

Mr. Sarkar is well-known to the profession. The present handy volume gives such elucidating comments as may be really assimilated by the students to whom it may be safely recommended. The commentary has been carefully classified and sets out the principle which can be extracted from the decided cases bearing upon each point.

Practice and Procedure in Civil Cases by Mahim Chandra Sarkar.

Model Pleadings and Deeds by Mahim Chandra Sarkar.—These two volumes embody the result of such experience of professional and judicial work as is possessed only by men of the type of Mr. Sarkar. Our students are many of them sound theoretical lawyers but they are often ignorant of the elementary rules of practice and procedure. We commend these two volumes to every novice in the profession and we have no doubt that if the junior members will carefully study them, they will be saved from many an awkward situation in the earlier stages of their career.

The Provincial Insolvency Act by Mahim Chandra Sarkar, Calcutta, 1914.—Mr. Sarkar is indefatigable as a commentator and the present edition is marked by the same thoroughness which characterises his other works. The notes are full and well arranged while the several appendices contain much useful information specially upon the pre-existing law on the subject. The Act of 1907 has led to a marked increase in insolvency work in our District Courts and it was necessary that carefully prepared edition should be brought out for use by the practitioners in this Presidency.

We beg to acknowledge receipt of a copy of a learned article on "**Datta Homam** as an essential ceremony in adoption" by Mr. Ramaswami Aiyar. The question is one of considerable interest notwithstanding the recent decision of the Privy Council and we hope the article now before us will help us to revive the interest of jurists in the solution of this problem.

The Calcutta Law Journal.

VOL. XXIII. }

CALCUTTA, APRIL, 16, 1916.

{ No. 8.

Landlord's Consent and Execution sale of Occupancy holdings.

The recent Full Bench decision of *Dayamoyi v. Ananda Mohan Roy*, 20 C. L. J. 52 has settled many of the debatable points regarding the transfer of occupancy holdings. Their Lordships answered the first question of the reference in *Ambika v. Ram Charan*, 20 C.L.J. 52 in the affirmative. The question was : Whether a right of occupancy, which is not transferable according to custom or usage is a right which can be transferred at all, and the answer being in the affirmative, it follows that occupancy right is not incapable of being validly transferred. But such a right, as has been pointed out in answer to the second question of the same reference, cannot be sold apart from the holding to which it is attached. It must go with the holding or not at all. It follows therefore from the answers to the first and second questions of the reference that a holding with a right of occupancy can be validly transferred.

The third question of the same reference was : "Whether the validity of the transfer can be questioned by any person other than the landlord of the holding." This was answered in accordance with certain propositions laid down by their Lordships. Objections as to the validity of transfers may come from three quarters viz., (i) from the raiyat, (ii) from the landlord and (iii) from other persons. Each of these three cases has been dealt with and it has been held that the transfer is operative as against the raiyat when he has made it voluntarily or allowed it to take place with knowledge but without objection. It has further been laid down that when the raiyat is bound by the transfer, the consenting landlord and all other persons are also bound.

Now, the question is : Can an occupancy holding be sold at an execution sale of a money decree, when the landlord consents but the raiyat objects to the sale ? Has the raiyat any right to object to the sale of his holding, when his landlord gives his free consent ? This point very often comes up before moffusil Courts in connection

with execution sales of occupancy holdings ; and the practice is not uncommon of allowing the sale to take place inspite of the raiyat's objection, if only the decree-holder has procured the landlord's consent.

The view that an occupancy holding can be sold at an execution sale with the consent of the landlord, inspite of the raiyat's protest, can be justified only on the assumption, that the right to question the validity of the transfer belongs only to the landlord and not to the raiyat. It would appear therefore that the transfer cannot be impeached by any person other than the landlord of the holding. This is exactly the point that was raised in the third question of the reference in *Ambika v. Ram Charan* and their Lordships' answer seems to suggest that the raiyat can object in case of an involuntary sale and have the sale set aside. If he keeps silent and does not impeach the sale, with knowledge of the same, the sale is operative against him. But even then it does not take effect against the landlord unless he consents to it. An involuntary sale, therefore, in order to be valid and binding against all persons must have : (i) the acquiescence of the raiyat and (ii) the consent of the landlord. Both the elements seem to be equally necessary ; the latter does not appear to be enough where the former is wanting. The sale is binding on the landlord " in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent." In other words, wherever the raiyat is bound, the consenting landlord is bound. But it would be an obvious fallacy to argue from this that wherever the consenting landlord is bound, the raiyat also is bound. The landlord may bind himself by his consent, but there is no justification for saying that the raiyat also would in that case be bound. The common practice of procuring the landlord's consent at an execution sale and getting the holding sold inspite of the raiyat's protest, is of doubtful validity in view of the Full Bench decision.

Under the earlier law, landlord's consent alone was no doubt thought sufficient to validate an execution sale of an occupancy holding. But a raiyat, at that time, was a mere cultivator of the land, with nothing like a right of property in it ; having neither the right of transfer, nor the right to object to a transfer. The character of non-transferability of their holdings was considered as an eventual protection to the improvident peasantry from greedy creditors. But so long as the raiyat is not given the right to object to a sale against his will, it is difficult to see how there can be a real protection. The Indian landlord has hardly been known to be an efficient guardian of his tenant's rights. If he colludes

with the creditor or himself plays the greedy creditor from whom the raiyat is sought to be protected, the raiyat has clearly no chance. Absolute non-transferability would, on the other hand, entail considerable hardship on the poor raiyat under modern economic conditions. Times have considerably changed since the day when the raiyat wanted little more than the peaceful cultivation of his ancestral holding, for the few necessities of his homely life. A sale or a mortgage was perhaps looked upon, in those days, as a great calamity. But the struggle for existence is getting harder every day, and the present day raiyat, with no other means of livelihood than agriculture, feels himself seriously handicapped, if, in a year of bad harvest or other case of emergency, he cannot raise a little money by a sale or mortgage of his lands. The force of circumstances has, however, necessitated dealings with occupancy holdings—the only property, if it might be so called, of the peasant class—in spite of uncertainties of the law. It is only reasonable that these dealings should have some legal sanction.

The extremely well-considered judgment in the Full Bench Case has removed the stigma of absolute non-transferability from occupancy holdings, but has at the same time defined the respective rights of the raiyat and the landlord to question the validity of the transfer. It is now settled that the purchaser of such a holding does acquire substantial rights, even if the purchase be made without landlord's consent. The rights of the purchaser cannot be ignored although the landlord is not bound to recognise them. It is useless therefore to plead want of landlord's consent at an execution sale of an occupancy holding under a money decree. Substantial rights would pass in spite of such consent. The landlord may or may not recognise the purchaser but that does not make the sale infructuous. The landlord does not seem to have any right to prevent or set aside an execution sale on the ground of absence of his consent. His remedies are quite different. The fetish of landlord's consent has, under modern conditions, lost much of its ancient homage. The purchaser without landlord's consent has not only the right of lawful possession against all persons except the landlord (whose right of re-entry is limited to a case of abandonment) but also the right to prevent the sale of the holding in execution of the landlord's rent decree, by depositing the decretal money before sale, or if the sale has been fraudulently made, to set it aside under Order 21 Rule 90, C. P. C. or failing that even to resist possession of the auction-purchaser under Order 21, Rule 100—practically all the rights available to an owner of property. Consent of landlord is thus necessary to make the sale operative against the landlord alone, not for validating the transfer

as against the raiyat and all other persons. It binds the landlord alone, not the unwilling raiyat.

The position, so far as the raiyat is concerned, seems to be this: He can validly transfer his holding or allow it to be validly sold, subject to approval by the landlord; but it cannot be sold against his will even if the landlord consents. This position is of no real hardship to the creditor because he can secure his debt by a valid mortgage. He has only to thank himself, if he chooses not to be so careful.

Dwijendranath Pal, M.A., B.L.,

Pleader, Dantan.

REVIEW.

The Indian Contract Act by T. V. Sanjiva Row, second edition by P. Ramanath Iyer, Law Printing House, Madras, 1915. —This is a revised and considerably enlarged edition of the Commentary on the Indian Contract Act, first published by the late Mr. Sanjiva Row in the Lawyer's Companion Series ten years ago. Each section of the Act is annotated not merely by references to Indian and English decisions but also by copious extracts from the writings of well-known English and American jurists. The notes are quite elaborate in many places for instance on the subject of penalty and liquidated damages. Notwithstanding other standard commentaries on the Contract Act this is indispensable by reason of its special features, viz., an exhaustive reference to judicial decisions and explanatory statement of first principles. The commentary is preceded by the bare text of the Act and is followed by a full index.

The Calcutta Law Journal.

VOL. XXIII. }

CALCUTTA, MAY 1, 1916.

{ No. 9.

DEVELOPMENT OF TESTAMENTARY POWER OF HINDUS IN BENGAL.

(Continued from Vol. XXII. p. 32n.).

Before passing on to the subject of the *limits* of testamentary power of Hindus of Bengal it is necessary to find out how far did the Indian legislature go to develop the law of testamentary power of Hindus in this country. We have already dealt with the early decisions of the Supreme Court and Sudder Dewany Adawlut and have seen that the judges of the Supreme Court in consultation with the Judges of the Sudder Dewany Adawlut in 1831, in the case of *Deo and Juggomohun v. Neemoo Dossee* laid down the rule that a Hindu Bengali who had sons, could sell, give, or pledge, without their consent, immovable ancestral property situate in the Province of Bengal, and that *without the consent of the sons, he could, by will, prevent, alter or affect their succession to such property* (1), and we have also noticed the fact that in 1832 *In the Goods of Multra Bibi* the Supreme Court held that the Supreme Court had undoubted right to grant probate and letters of administration to the Hindus. Now we shall see how the Indian Legislature dealt with the matter. The first legislative provision which we shall consider is Reg. XI of 1793, Sec. 6. This is a Regulation passed on the 1st May, 1793, "for removing certain restrictions to the operation of the Hindu and Mahomedan laws, with regard to the inheritance of landed property, subject to the payment of revenue to Government". Section 6 of this Regulation says that nothing contained in this Regulation is "to prohibit any actual proprietor of land bequeathing or transferring, by *will*, or by a declaration in writing, or verbally, either prior to or subsequent to the 1st July 1794, his or her landed estate entire to his or her eldest son, or next heir, or other son or heir, in exclusion of all other sons or heirs, or to any person or persons, or to two or more of his or her heirs in exclusion of all other persons, or heirs, in the proportions, and to be held in the manner, which such proprietor may think proper, provided that the bequest or

transfer be not repugnant to any Regulations that have been or may be passed by the Governor-General in Council, nor contrary to the Hindu or Mahomedan law ; and that the bequest, or transfer, whether made by a will, or other writing, or verbally, be authenticated by or made before such witnesses, and in such manner, as those laws and Regulations respectively do, or may require." Now it may be said that this section removes all doubt about the existence of the testamentary power of the Hindu at the time when that Regulation was passed, because the right to dispose of property by *wills* has been expressly recognised by this Regulation and it was passed a year after the decision of the Supreme Court in the Nudia Raj case. In examining such an argument we should remember that this section also says that the bequest or transfer, should not be contrary to the Hindu or Mahomedan law or in other words the testamentary right of Hindus recognised by the Legislature and the Courts of law in the past and the present time must be a right recognised by Hindu law. Knowledge of Hindu and Mahomedan law by the early Anglo-Indian Judges and legislators was very defective. Following two instances will show that however anxious the early Anglo-Indian Administrators might have been to preserve the rules of Hindu and Mahomedan law, they sometimes did change them (1). They legislated thinking that they were acquainted with the rules of Hindu and Mahomedan law and that the rules known to them were the correct rules of law, then after a few years it was found out that the rules of law known to the early legislators and on which the early Regulations were based were not the correct rules and then the question arose whether the mistakes made in the early Regulations should be rectified by subsequent legislation and in some cases the mistakes were really corrected, but in others the old rules laid down by the early Regulations were left unaltered.

We shall first take the case where the erroneous view followed in the early Regulations was rectified by subsequent legislation. This can be clearly seen by comparing the preambles of Reg. XI of 1793 and Reg. X of 1800. The preamble of Reg. XI of 1793 runs as follows: "A custom, originating in considerations of financial convenience, was established in these provinces under the native administrations, according to which, some of the most extensive *semindari*es are not liable to division. Upon the death of the proprietor of one of these estates, it devolves entire to the eldest son, or next heir of the deceased, to the exclusion of all other sons or relations. The custom is repugnant both to the Hindu and Mahomedan laws, which annex to primogeniture no exclusive right of

(1) See Sir William Jones' remarks on the subject in "*Condification in British India*" p. 334.

succession to landed property, and consequently subversive of the rights of those individuals, who would be entitled to a share of the estates in question, were the established laws of inheritance allowed to operate with regard to them, as well as all other estates. It likewise tends to prevent the general improvement of the country, from the proprietors of these large estates not having the means, or being unable to bestow the attention, requisite for bringing into cultivation the extensive tracts of waste land comprised in them ... the Governor-General in Council has enacted the following rule." Then follow six sections the last of which has been quoted above. Few years after the passing of this Regulation it was found that in some place there were impartible estates and in 1800 this fact was recognized by the Legislature in Regulation X of 1800. The preamble of that Regulation is "By Regulation XI of 1793, the estates of proprietors of land, dying intestate are declared liable to be divided among the heirs of the deceased, agreeably to the Hindoo or Mahomedan laws. A custom, however, having been found to prevail in the jungle mehals of Midnapoor and other districts, by which the succession to landed estates invariably devolves to a single heir without the division of the property, and this custom having been long established, and being founded in certain circumstances of local convenience which still exist, the Governor-General in Council has enacted the following rule, to be in force in the provinces of Bengal, Behar and Orissa, from the date of its promulgation.

"II. Regulation XI of 1793 shall not be considered to supersede or affect any established usage which may have obtained in the jungle mehals of Midnapoor and other districts, by which the succession to landed estates, the proprietor of which may die intestate, has hitherto been considered to devolve to a single heir, to the exclusion of the other heirs of the deceased. In the mehals in question the local custom of the country shall be continued in full force, as heretofore, and the Courts of Justice be guided by it in the decision of all claims which may come before them to the inheritance of landed property situated in those mehals."

The preambles of these two Regulations clearly show the solicitude of the early Anglo-Indian Administrator for the preservation of the rules of Hindu and Mahomedan law. But there were occasions when they unwittingly changed the rules of Hindu and Mahomedan Laws, and when they came to know of this change they refused to modify the rules of the early Regulations. This happened in the case of law of limitation in Bengal. Now as one of the important questions before the Punjab Customary Law Commission is whether the customs in the Punjab which do not

allow the application of the law of limitation to certain cases should be altered by the Legislature by providing for the barring of such actions by law of limitation, the way in which this question was dealt with by the early legislators in Bengal in the 18th century may be of some use to the Punjab Legislators. It will be interesting to note here how the Law of Limitation became applicable to the Mahomedans in Bengal, though in Mahomedan law there is no provision for barring of actions by lapse of time. The earliest Regulation in which the subject of limitation of suits was referred to is the Judicial Regulation of 21st August 1772 (generally known as the Plan of Warren Hastings). Rule 15 of the Plan of Warren Hastings recited "by the Mahomedan law, all claims which have lain dormant for twelve years, whether for land or money, are invalid: this also is the law of the Hindus, and the legal practice of the country." This provision was re-enacted by section 19 of the Judicial Regulation passed on the 11th April 1780, by section 20 of the Judicial Regulation of 5th July 1781, by section 14 of Regulation III of 1793, by section 8 of Regulation VII of 1795 and section 18 of Regulation II of 1803. Then it was ascertained that the observation about the rules of Mahomedan law in Rule 15 of the Plan of Warren Hastings was not correct and that the period of limitation fixed by that Rule and followed in subsequent Regulations was not in accordance with the rules of Mahomedan laws, though it was consistent with the "legal practice of the country"(1). Then the question arose whether the rule laid down in the early Regulation should be changed and in 1805 it was decided that the Rules "having been in force above thirty years it would be improper to abrogate it," but the application of that Rule was limited to certain cases only (2).

It is clear from the above-mentioned facts that sometimes the preambles and provisions of the early Regulations were based on insufficient and unsatisfactory material and the mere use of the word "*will*" in section 6 of Reg. XI of 1793 will not justify the inference that the people of this country towards the end of 18th century did generally dispose of their property by will. But at the same time it is also certain that at that time some people in this country did dispose of property by instruments, which should come into force, only after the death of the executant of the document; and the important proviso, then, as it is now, was that no Bengali Hindu could dispose of his property in any way which would be inconsistent with the rules of the Hindu law. After acknowledging

(1) See "*Codification in British India*" Tagore Lectures for 1912, pp. 84, 293, 294.

(2) Reg. II of 1805 preamble.

the testamentary rights both the legislature and the Courts said that that power should not be exercised in any way which is not allowed by Hindu law or in other words the rules of Hindu law which govern disposition of property *inter vivos* should also govern the disposition of property by wills. This brings us to the question of the limits of the testamentary powers of Hindus in Bengal. In this subject also we find that though the Courts were anxious to follow the rules of Hindu Law, they did depart from them and developed Hindu law. Soon after the recognition of testamentary powers of Hindus by the Courts of law good many questions e. g. rule against perpetuities, accumulation, creation of contingent interest by way of executory devise, question of interpretation of wills, bequests for limited time with contingent remainder over &c., creation of trusts, power of appointment, questions not dealt with in Hindu law came up before the Courts and some of them have been decided satisfactorily and others are still undecided.

Before passing on to the question of limits of the testamentary power of the Hindus in Bengal we should also consider here a question of testamentary capacity *viz.*, the testamentary capacity of Hindu females. If we decide this question by the rules laid down in the *Vedas* and *Manu*, a method disapproved by the Privy Council for good reasons we shall find that Hindu females cannot have testamentary capacity for the simple reason that they cannot have wealth exclusively their own. "Baudhayan" says Sir Gooroodass Banerjee (1) "after declaring the perpetual tutelage of women, cites a passage from the Vedas to the effect that women are incompetent to inherit, and in the Institutes of Manu there occurs the well-known text 'Three persons,—a wife, a son, and a slave,—are declared by law to have *in general* no wealth exclusively their own: The wealth which they may earn is *regularly* acquired for the man to whom they belong.'" This was the law in the Vedic age (2) and in Manu's time. But inspite of these strict rules there was gradual development of Hindu law on this subject and centuries later Jimutavahana in Dayabhaga recognized absolute ownership of females in some kinds of property. "Manu and Katyayana" says Jimutavahana (3) "describe the separate property of a woman. "What was given before the nuptial fire, what was presented in the bridal procession, what has been conferred on the woman through affection, and what has been

(1) *The Hindu Law of Marriage and Stridhan*, 4th Ed. p. 336, Lec. VIII.

(2) It should be noted here that such rules were in force at a time when females did occupy a high position in society and even composed some of the verses of the *Vedas*.

(3) Dayabhaga Ch. IV. Sec. 1. § 4.

received by her from her brother, her mother, or her father, are denominated the sixfold property of a woman' " Then we also find "since various sorts of separate property of a woman have been thus propounded without any restriction of number, the number of six (as specified above) is not definitely meant. But the texts of the sages merely intend an explanation of woman's separate property. That alone is her peculiar property, which she has power to give, sell or use, independently of her husband's control." But we also find in *Dayabhaga* on the authority of *Katyayan* "The wealth, which is earned by mechanical arts, or which is received through affection from any other (but the kindred) is always subject to her husband's dominion. 'The rest is pronounced to be the woman's property' (1).

So we find that according to *Dayabhaga* Hindu females have absolute ownership only in certain kinds of *stridhan*. "So that" says Sir Gooroodass Banerjee (2) "a woman has independent and absolute ownership over her *saudayika stridhan* (gifts from affectionate relations) with the exception of gifts from her husband, and over these last, if not consisting of immovable property, her power of disposal becomes absolute after his death ... Over certain descriptions of property a woman has at all times absolute power of disposal, and over certain other descriptions she never has such power ; while regarding a third class of property, her power of disposal is restrained during coverture only."

As a Hindu woman cannot alien her *stridhan* other than *saudayika*, during coverture without her husband's consent, it follows that her testamentary power of disposition is subject to the like restriction where she is survived by her husband, who is not shown ever to have assented to the will (3).

Then again in *Dayabhaga* Ch. IV Sec. 1 § 23 we find "But in the case of immovables bestowed on her by her husband, a woman has no power of alienation by gift or the like. So *Narada* declares : 'What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or may give it away excepting immovable property.'" But it has been held by the Calcutta High Court that where immovable property is given by the husband to the wife with express power of alienation, or when this power is implied by the grant, she would acquire an absolute power of disposal over the property (4). It has also been held that where a

(1) *Dayabhaga* Ch. IV. Sec. 1 § 19.

(2) *Hindu Law, Marriage and Stridhan*, 4th. Ed. pp. 338, 339. See also *Bhanu v. Raghunath* (1905) 30 B. 229.

(3) *Bhanu v. Raghunath* (1905) 30 B. 229, 240.

(4) *Sarda v. Kristo* (1900) 5 C. W. N. 300 per Banerjee J.

Hindu widow who received presents of movable property from her husband from time to time during their married life, and years after the death of the husband she purchased immovable property, partly out of such property and partly with money, the sale proceeds of jewellery forming part of her *stridhan*, she could dispose of such immovable property by her will (1).

As in the case of male so in the case of females also the testamentary power is commensurate with her power of disposition in her life-time (2).

B. K. Acharyya.

(1) *Venkata Ram v. Venkata Suriya* (1880) 2 M. 333 P. C.

(2) *Ibid.*

(To be continued.)

REVIEWS.

The Hindu Law of Adoption by Sastri Golap Chandra Sarkar, M.A., B.L., 2nd Edition, R. Cambray & Co., Calcutta—All members of the legal profession will welcome the second edition of the famous Tagore Law lectures on the Hindu Law of Adoption by the late Sastri Golap Chandra Sarkar. Since their first publication more than a quarter of a century ago, they have been rightly regarded as the standard authority on this difficult department of Hindu Law. The present edition is a reproduction of the first with two differences. The new decisions are duly noted in the foot-notes and the new developments of the law by reason principally of judicial decisions are incorporated in addenda at the end of each lecture. This method has its advantages as well as disadvantages. While on the one hand it shows the recent development of the law, one cannot but feel that a thoroughly rewritten work from the pen of so eminent a lawyer would have been of inestimable value to the profession. It is superfluous to dwell in detail on the merits of a work which is now an acknowledged classic and we have no doubt that this new edition brought out by Babu Rishindra Nath Sarkar will help to popularise the views of his distinguished father in an important branch of Hindu Law which he had made all his own by lifelong study and research.

Compulsory Sales in British India by Samatul Chandra Dutt, M.A., B.L., Tagore Law Lectures 1913, S. Miller & Co., Calcutta, 1915.—The subject of Compulsory sales is of every day use to the

members of legal profession and is full of intricacies. An examination of the present work convinces us that the subject could not have been entrusted to a more capable and conscientious lawyer. The author first deals with general principles and then discusses the incidents of execution sales, rent sales, revenue sales, public demand sales, putni sales, partition sales and sales by distress. The principles are stated lucidly and are copiously illustrated. The book is singularly free from padding and is eminently fitted to be carefully studied. It will also be useful to the practitioner by reason of numerous references to judicial decisions given in the foot-notes. But it is in no sense a digest ; it is a book intended to be read and not merely to be occasionally consulted. The work will take rank as one of the most creditable contributions to the long series of Tagore Law Lectures.

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The Calcutta Law Journal.

VOL. XXIII. } CALCUTTA, MAY, 16 & JUNE 1, 1916. { NOS. 10 & 11.

PARENTAL RIGHTS.

What was originally only an interest of the father in his child considered as a *thing*, became after a time a *personal*, protected interest of the father worked out through long stages in the progress of civilization. The interest of the father, who was the head of the family was also the interest of the family. The family power was succeeded by state power and the present day paternal power is based not on the interest of the father but that of the child. Thus in appointing the guardian of a minor the Court is guided by what, *consistently with the law to which the minor is subject*, appears to be for the *welfare of the minor* (1). The child requires, so long as it is young, protection and education. From these ethical, physical and social interests, corresponding rights and duties of parents with reference to children, arise. The various legal provisions regarding moral and religious training of children, and in particular the duty of obedience on the part of children are based on these interests : The parental power involves the right and duty to care for the person and the property of the child. In Hindu, as in other systems of ancient law the parental power was exercised only by the father, or rather the "house father" and was practically unlimited. In course of time this power devolved in certain cases on the mother, but the mother was easily divested of her rights, at the instance of the relatives of the minor. Jagannath in his Digest (2) in dealing with the question of the protection of the property of infants quotes a text of Manu to the effect that the king should guard the property which descends to an infant by inheritance until he returns from the house of his preceptor or until he has passed his minority. To this is added an explanation from *Ratnagar* that wealth, which descends to an infant by inheritance and becomes the property of the minor, let the king guard, that is, let him protect it from the other heirs. The texts subsequently quoted from *Vishnu*, *Sancha* and *Lichita* tend to the same conclusion, namely, that the king should guard the property of an infant and

(1) Sec. 17 Guardians and Wards Act (viii of 1890).

(2) *Colebrooke's Digest* vol. iv, pp. 242—244 (1798 Ed.)

protect it, as he is incapable from nonage of conducting his own affairs. *Jagannath* then comments on a text of *Baudhayana* that in respect of shares of infants, the king must himself, or through some person appointed by him, keep the share of the minor: the expenses and other matters should be superintended by the king himself or by a person appointed by him: the property of a minor should be entrusted to heirs and the rest appointed with his concurrence or, if the infant be absolutely incapable of discretion, with the consent of a near and unimpeachable friend, such as his mother and the rest. According to *Katyana* kinsmen must guard the property of an infant. In the comments on text 453 *Jagannath* adds, that in practice a mother is guardian of a minor and of his property; but "he seems to hold" says Mookerjee J. (1) "that she may not always be skilled in the conduct of affairs, in which case the king, as the universal superintendent, may arrange to guard the property by every possible means."

Some of the cases in which the mother can be deprived of her right of guardianship came under section 3 of Act XV of 1856 (*Hindu Widows' Remarriage Act*) which runs as follows:—"On the marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted, by the will or testamentary disposition of the deceased husband, the guardian of his children, the father or paternal grandfather or the mother or paternal grandmother of the deceased husband, or any male relation of the deceased husband, may petition the highest Court, having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death, for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court if it shall think fit, to appoint such guardian, who, when appointed, shall be entitled to have the care and custody of the said children or any of them during their minority in the place of their mother, and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother, provided that when the said children have not property of their own, sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother, unless the proposed guardian shall have given security for the support and proper education of the children whilst minors." In *Gunga Pershad v. Jhalo* (2) it has been held that this section does not compel the Court to remove the mother from the guardianship of her infant children by her first

(1) *Gunga Pershad v. Jhalo* (1911) 13 C. L. J. 558.

(2) (1911) 13 C. L. J. 558.

husband merely because she has remarried and that there is nothing in Hindu law which makes it obligatory upon the Court to remove the mother from such guardianship. The Court has discretion to remove her from such guardianship, but the exercise of such discretion must be regulated from the point of view of the welfare of the infant.

There is another important class of cases where the question of parents' right to guardianship came up before the Court, *viz.*, where the parent changes his or her religion. There are many cases on this subject but here we shall examine two cases only. The first is *Mokoond v. Nobodip* (1898) 25 C. 881. In this case it was held that *prima facie* the father is entitled to say in what religion his infant child should be brought up, but, at the same time, that in a proper case, there is undoubted jurisdiction in the Court to disregard those wishes. But the circumstances must be at least unusual to justify the Court in so acting. Both the English and Indian authorities establish, that, even as against the *prima facie* legal right of the father to the custody and control of the education of his child, the real object to be considered is the welfare of the child, and under section 17 of the Guardians and Wards Act the Court has to be guided by what, consistently with the law to which the minor is subject, appears under the circumstances to be for his welfare. The word 'welfare' has been used in its widest sense and looking not only to the question of money and comfort, but to the moral and religious welfare of the child and to the ties of affection (1). Under the circumstances of this case the Court held that the father had abdicated his strict legal parental rights and was not entitled to be the guardian of his child. The other case is that of *Dwijapada v. Baileau* (2) where it was held that when a Hindu female becomes a Christian, that fact will not in itself be a ground for removing her from the guardianship provided that she is in a position to satisfy the Court that she is able to carry out the obligations which the law imposes upon her of bringing up her children in the faith of her husband, whatever may be the faith she herself may adopt. In such a case the Court may associate, with the mother, a Hindu relative as a guardian. The question of the parental right to control the religious education of children, is very important and is the subject of an article in *Harvard Law Review* Vol. XXIX, p. 485. We shall reproduce that article first and then discuss the question generally in these pages.

I.

"The sixteenth century in England was a period of armed religious

(1) *Mokoond v. Nobodip* (1898) 25 C. 881, 885.

(2) (1915) 20 C. W. N. 608, 609, 610.

strife in which Catholics and Protestants alike, when a suffering minority clamoured for liberty of conscience, and when in power proscribed every creed but their own. As Protestantism slowly forged victory out of the conflict it secured itself in the ascendancy by various repressive statutes against Catholicism. As early as 1590 the Elizabethan government aimed at the suppression of Catholic education by enacting that only schoolmasters who repaired to the Established Church might be maintained (1), followed four years later by a further statute which punished as a *premunire* the sending abroad of a child for Catholic education (2). From time to time further laws (3) were passed to render more effectual the suppression of Catholic education, until by 1699 it was a crime punishable by perpetual imprisonment for any Papist to keep school or assume the education of youth (4).

Naturally during this period, in the face of such public sentiment and of such laws there was little or no litigation in the Courts of England on the part of Catholic parents to protect any parental rights in relation to their children. Indeed the temper of the Courts, reflecting this prevalent spirit of religious intolerance, is well illustrated by their action in *Shaftsbury v. Hannam* (5), where upon an insinuation by counsel for the plaintiff that the defendant was a Papist, although "utterly denied" by her, an order was entered that unless Lady Hannam "dispose herself to receive the sacrament according to the rites of the church of England, before the end of the next term, and produce a legal certificate thereof, the Court would then consider to remove the infant into such hands as might secure his education in the Protestant religion."

In order to stimulate the conversion to Protestantism of Catholic children the Act of 1699 (6) compelled Catholic parents to support their Protestant children. In 1701 St. Andrew's Undershaft Parish in London sought to compel a Jew to maintain a daughter whom he had turned out-of-doors because she had embraced Christianity. The action (7) failed because it was held not to come within any existing statute. Thereupon in the same year a further statute was passed obliging Jews to maintain and provide for their Protestant

(1) 23 Eliz. 1.

(2) 27 Eliz. 2

(3) Sic : 1 Jac. I. C. 4 ; 3 Car. I C. 2 ; 13 & 14 Car. II c. 4. See. 2. Bacon Abr. Tit. Papists and Popish Recusants.

(4) 11 & 12 Wm. III C. 4. No attempt is made to cover any of the side currents of religious conflict between Protestant sects such as the struggle between the Church of England and Non-conformists. Sic : Five Mile Act, 13 & 14 Car. II. C. 4 etc. etc.

(5) (1677) Finch 323.

(6) 11 & 12 Wm. III c. 4, § 7.

(7) *Inhabitants St. Andrew v. De Breta*, (1789) 1 Ld. Raym 699.

children (1), and the following year a similar provision was incorporated in the Anti-Catholic Act applying the same principle to Catholics and their Protestant children in Ireland (2). To what lengths the Court was prepared to go under such statutes to stimulate proselytizing is shown when they awarded a Christian daughter forty-four years of age, and married, maintenance out of her Jewish father's estate even after his death (3). In the zeal to uphold Protestantism family ties cut no figure. The Court did not hesitate to deprive a widow of the custody of her minor children so that they might be brought up Protestants, although both parents had always been Catholics (4). Even when a Catholic mother was bringing up her son as a Protestant according to the wishes of her late husband the Court was so blind to all considerations except the possible dangers to the child's Protestant religious education in such a situation that it ordered the separation of the mother and her child of seven years (5). Marriage to a Catholic of a Protestant widow, even though she continued a Protestant, was considered sufficient to justify depriving her of custody of her daughter (6).

Toward the middle of the eighteenth century, when the Protestants felt themselves secure in their power, while the statutes themselves were not repealed, the rigorous insistence on anti-Catholic extremes in the Courts began to relax. In 1729 Lord Chancellor King refused to punish in chancery a guardian because he had allowed his ward to be educated a Roman Catholic (7), and in 1756 Lord Hardwicke took the position that while the Chancery Court can refuse to appoint Papists guardians, there was no law to take a guardianship away from them (8). By 1765 Blackstone wrote: "What foreigners who only judge from our statute-book are not fully appraised of (is) that these laws are seldom exerted to their utmost rigor" (9). Once sown, the seeds of a liberal and enlightened point of view of the conflicting claims of rival religions took sure root in the Courts and grew steadily until by Lord Eldon's time, with the evident approval of the bar and bench, he

(1) 1 Anne 30.

(2) 2 Anne 6.

(3) *Vincent v. Fernandez*, (1718) 1 P. Wms. 524. See also *Moses, v. Moses*, (1723) 1 Sander's orders in Ch. 457 and (1727) 524.(4) *Preston v. Ferrard*, (1720) 4 Bro. P. C. 298.(5) *Teynham v. Lennard*, (1724) 4 Bro. P. C. 302 ; 9 Mod. 40, 2 Eq. Cas. Abr. 486.(6) "By reason that she had married a Papist." *Edwards v. Wise*, (1740) Barnard, Ch. 139.(7) *Ex parte Hales*, (1729) Mos. 249.(8) *Blake v. Leigh*, (1756) 1 Ambl. 306.

(9) Bl. Comm, Bk. iv, C. 4, P. 57.

was able to turn his back squarely on the old precedents (1) and take the position that the Court looked with equal favour on all religions (2).

From this time on the Courts have been able to maintain a rational judicial attitude toward religious controversies and the religious aspect of the legal relationship of parent and child and of guardian and ward has been allowed to develop along definite legal principles."

(To be continued.)

(1) "Lord Bathurst made an order to prevent a Protestant child from being sent to a Roman Catholic school. This Court, with reference to the distinction between Protestants and Catholics, interfered then in the education of children in many cases in which it would not interfere now." *Wellesley v. Beaufort*, (1827) 2 Russ 1, 22.

(2) *Lyons v. Blenkin*, (1821) Jac. 245.

Vice Ch. Leach on an application to appoint guardians raised a question whether of those named in a will the Duke of Norfolk might be an improper person because he was a Papist. Lord Eldon took the position that the law had changed. *Elwes v. Const.* 1 Mod. Eq. 435ⁿ. The modern liberal doctrine is perhaps most succinctly put by Sir John Romilly. "In the matter of religion, the Court holds that the Roman Catholic faith and the Protestant faith are to this extent equally beneficial to the child." *Austin v. Austin* (1865). 34 Beav. 257, 263. It was, however, left unchallenged that Christianity is part of the law of the land; (*Da Costa v. De Pas*, (1754) 1 Amb. 228, and this doctrine was so held until overthrown in the mid-Victorian period. *Reg. v. Bradlaugh*, (1883) 15 Cox. C. C. 217. At the same time Lord Eldon recognized that it was lawful for a Jew to educate his children as Jews. *Villarreal v. Mellish*, (1819) 2 Swan, 533.

REVIEWS.

The Law of Transfer in British India by H. S. Gour, M.A., D.C.L., LL.D. 4th Edition. Vol. III. Thacker Sprink & Co., Calcutta, 1916.—The concluding volume of Dr. Gour's monumental work on the Law of Transfer in British India deals with the subjects of leases, gifts, exchanges and actionable claims. The commentary has been thoroughly revised and the references to judicial decisions have been brought down to the 31st January, 1916. Valuable appendices have been added. The first deals with the subject of the Law of Conveyancing in England and furnishes a number of useful conveyancing forms. The second set of appendices gives the history of the 'Transfer of Property Bill in its various stages. There is an elaborate index and an agenda to the first two volumes. Every

topic is exhaustively discussed so as to render the book indispensable as a work of reference. This edition has been printed by an enterprising firm of Madras printers, the Law Printing House, Madras. The get up is worthy of the contents of the volume.

Bengal Tenancy Act by Surendra Chandra Sen, B.L. Third Edition, Calcutta 1916. Price Rs. 8.—The commentary on the Bengal Tenancy Act by Mr. Sen has enjoyed since its first publication a well-deserved reputation of thoroughness and accuracy. The second edition has been out of print for some time and the present edition in which the work has been entirely recast and greatly enlarged will be welcomed by the profession in view of the large accumulation of case law within the last few years. Many portions of the Commentary have been rewritten and the notes of the decisions have been brought absolutely up-to-date. We have tested the statements of law and the references in many places and have not come across any notable error. We have no doubt this new edition will for the present at any rate be found the most reliable and convenient guide to the endless intricacies of the Law of Landlord and Tenant in Bengal.

Index of Cases judicially noticed 1811-1915 by B R. Desai. 5th Edition. Baroda, 1916. Price Rs. 12—No extended review is needed in the case of a book which has reached a fifth edition, has found its way into the hands of practitioners all over the country and has had its merits tested by daily use. New features have been introduced in this edition to increase the utility of the book. In a book of this kind accuracy is the first essential and constant use has satisfied us that the book is in a large measure free from errors, but there are errors in the book and it will be quite worth while before another edition is called for to have all the references tested. We shall mention a remarkable instance of error we have come across. On page 432 it is stated that the case in 17 C. W. N. 1088 is followed in 18 C. W. N. 785. The earlier case relates to the law of landlord and tenant in Bengal; the later case where it is supposed to be followed is the decision of the Privy Council in *Arnold v. King Emperor* which makes no reference to 17 C. W. N. 1088. Again the case in 18 C. W. N. 785 is said to be also reported in 23 I. C. 681, but the case to be found in the latter volume on the page mentioned is the decision of the Judicial Committee in *Ibrahim v. Emperor*. We do not point out these errors with a view to disparage the work which as a rule is singularly free from errors, but we desire only to strengthen our suggestion that the references should be overhauled.

The Law of Land Acquisition in British India by A. K. Nanniah, B.A., B.L.—Law Printing House, Madras, 1915.—This

volume is a reproduction of the Commentary on the Land Acquisition Acts of 1885 and 1894, originally annotated by late Mr. Sanjiva Row. Each section is annotated by extracts from judicial decisions and from authoritative text-books. To these acts are added annotated extracts from a number of special acts such as the Calcutta Improvement Act and the Calcutta Municipal Act which bear on the subject of acquisition of land by Corporations. The whole work has been brought up to date and maintains the high standard of the Lawyer's Companion Series.

The Law of Gaming and Wagering by S. G. Velinker, B.A., LL.B., 2nd edition, Times Press, Bombay, 1916—This is the second edition of a work on the Indian Law of Gaming and Wagering, first published 15 years ago. The volume contains all the Indian Statutes on the subject but the notes are collected only under the text of the Bombay Act. It would have been more useful if the matter had been thrown into the form of a continuous text and references had been given in the course of the text to the sections, of the various legislative enactments. As now arranged the book will be rather difficult to use by any but those who are familiar with the provisions of the Bombay Statute. Subject to this criticism we have nothing but to praise for the notes which are concisely and accurately expressed and appear to cover all the principal points in connection with somewhat difficult topic.

Land Tenures in the Madras Presidency by Sundraraja Iyengar, B.A., B.L., Madras, 1916—This modest volume is a work of great merit. It brings together in a very readable form the whole of the land law of the Madras Presidency including not merely an account of the different forms of tenures prevalent there but also the law of landlord and tenant and the law of recovery of arrears of rent and revenue. The Statutes are set out in full in the appendix and are followed by an excellent glossary. A book of this description of each of the Presidencies especially for Bengal is urgently needed and we trust will be undertaken by some competent lawyer still in expectation of cases to come. We may draw special attention to the introductory chapter which gives a very reliable account of the origin and existence of private property in ancient India.

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It is obligatory upon an applicant under section 42 of the said Act to establish the existence of one or more of the circumstances mentioned therein.	
Under section 27 of the Provincial Insolvency Act, consent of all the creditors is not by itself necessarily sufficient to justify an order of annulment.	
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The order contemplated by clause (1) of rule 6 of order 38 of the Code of Civil Procedure is an order of attachment ; the attachment which the Court is directed by cl. (2) of the said rule, to withdraw, is a conditional attachment made in terms of clause (3) of rule 5.

Where the Court directed, on an application made by the plaintiffs for attachment before judgment, the issue of notices upon the defendants to show cause why an attachment should not issue before judgment, and at the same time directed the defendants not to part with the properties in any way :

Held, that the order was not in accordance with O. 38 R. 5 of the Code of Civil Procedure.

Where the Court upon the defendants appearing in the said notices and showing cause, hearing both parties and considering the affidavits filed by them, expressed an opinion that sufficient cause had not been made out for attachment and dismissed the application of the plaintiffs :

Held, that no appeal lay against the order of dismissal under O. 43 R. 1 Cl. (g) of the Code of Civil Procedure. *Mahendra Narain Saha v. Gurudas Balragi* 392

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Per curiam : An appeal lies against an order of a Judge on the Original Side of the High Court, refusing to set aside an order of dismissal of a suit made by him under Order 9, rule 8 of the Code of Civil Procedure.

Per Sanderson, C. J. and Mookerjee, J. : Such appeal lies under order 43, Rule 1 Cl. (c) of the Code of Civil Procedure.

Per Woodroffe, J. and Mookerjee, J.—Such appeal lies under clause 15 of the Letters Patent.

Per Mookerjee, J. : The appellant has to establish that he has a right of appeal.

The effect of section 104 of the Code of Civil Procedure is not to take away a right of appeal given by clause 15 of the Letters Patent, but to create a right of appeal in cases even where clause 15 is not applicable.

Appeal—(Contd.).

A client may be penalised for a grave error of judgment on the part of his counsel in so far as payment of costs is concerned, but not to the extent of dismissal of his claim without investigation. *Mathura Sundari Dassi v. Haran Chandra Shaha*

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—*Provincial Insolvency Act (III of 1907), Secs. 43, Sub-sec. (2), 46 Sub-secs. (2) and (3)—Receiver—Court, if can authorise receiver to ascertain facts and report.*

Under sub-section (2) of section 46 of the Provincial Insolvency Act, an appeal lies against an order under sub-section (2) of section 43 for imprisonment of the insolvent but not against an interlocutory order calling upon the insolvent to show cause why an order should not be made against him under sub-section (3) of section 43.

Quere : Whether the High Court can give leave to appeal against such order under sub-section (3) of section 46.

The receiver is an officer of the Court and when he has good grounds to believe that an enquiry should be made into the conduct of the insolvent, the Court can authorise him to ascertain the facts and to report them to it, with a view to the adoption of such steps as may be deemed necessary in the interests of justice. *Monmohon Roy v. Hemanta Kumar Mookerjee*

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—*Suit for rent—Bengal Tenancy Act (VIII of 1885), Sec. 153 (b) Relationship of landlord and tenant—Second appeal—No appeal from primary Court maintainable.*

No appeal lies from a decision of a Court specially empowered to exercise final jurisdiction under section 153 (b) of the Bengal Tenancy Act, in a suit for rent valued less than Rs. 50, deciding a question of whether or not the relationship of landlord and tenant existed.

Where no appeal lies from a primary Court to the first appellate Court, no second appeal lies from the latter Court to the High Court. *Kallipada Karmakar v. Shekhar Basini Dasg**

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—, if lies—Order refusing to remove a receiver already appointed ;
See Receiver

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—, *infructuous—Order—Execution—Appeal, filing of—Stay of execution—Civil Procedure Code (Act V of 1908), O. 41, R. 5, Sub-R. (2)—Court of appeal, duty of—Event, subsequent.*

An order was passed on the 26th April, 1915, by the primary Court, granting leave to the receiver to settle a claim of the estate against a certain person for certain sum. A letter was sent to the receiver on the 1st May by the appellant saying that she was going to appeal from the order and asking him not to take any steps in respect of that order until the appeal was filed. On the following day, the receiver replied that he could not wait indefinitely for the proposed appeal and would proceed to carry out the order, unless an order for stay was obtained from the Court of appeal. The appellant took no steps to file an appeal or to obtain an order for stay of proceedings. The receiver carried out the order, the settlement with the debtor was duly effected, and the deed of

* Overruled on Review ; see 24 C. L. J. 235.

Appeal—(Contd.).

release in his favour was executed and registered on the 10th June, 1915.

The present appeal was thereafter lodged on the 23rd June, 1915 :

Held, that the appeal had become infructuous by reason of the laches of the appellant.

Per Mookerjee J : That there was nothing to prevent the appellant from obtaining an order for stay, even before the appeal was actually lodged.

That it was incumbent upon a Court of appeal to take note of events subsequent to the order under appeal. **Rameswari Chaudhurani v. K. B. Dutt** 310

———, right of—Appellant to establish ; *See Appeal* 443

———, where lies—Sentences passed by Assistant Sessions Judge ; *See Criminal Procedure Code, Sec. 408* 595

——— against order—Execution—No application for stay of execution—Laches ; *See Appeal, infructuous* 310

——— from Insolvency order—Jurisdiction of appellate Court—Presidency Towns Insolvency Act, Sec. 8 (b)—Civil Procedure Code, Sec. 117, O. 41 R. 10 ; *See Security for costs* 24

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Application for an order to set aside a decree ex parte—Application for an order to set aside an order of dismissal for default—Provincial Small Cause Courts Act, Sec. 17, Sub-sec. (1) ; See Ex parte decree 147

——— for an order to set aside an order of dismissal for default—Application for an order to set aside a decree *ex parte*—Provincial Small Cause Courts Act, Sec. 17, Sub-sec. (1) ; *See Ex parte decree* 147

——— for appointment of receiver—Mortgagee, suit by—Court's duty ; *See Receiver* 440

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Arbitration—Order of reference—Award—Agreement to refer signed by all parties, but application for an order of reference not signed by one of them—Order of reference made in the presence of all parties—Decree made according to award—Revision—Review of order refusing revision—Code of Civil Procedure (Act V of 1908), S. 115, O. 47, r. 1 and Schedule II. Ss. 1, 15 and 16.

Schedule II to the Code of Civil Procedure, 1908 which provides by S. 1 that where the parties to a suit have agreed that the matter in difference shall be referred to arbitration they may apply in writing to the Court for an order of reference, does not require that the writing should of necessity be signed.

Arbitration—(Contd.).

Before the trial of a suit all parties thereto entered into an agreement to refer the questions in dispute to arbitration: The agreement was signed by the plaintiffs and defendants each with his own hand, excepting in the case of a minor defendant on whose behalf it was signed by his guardian-*ad-litem* appointed by the Court. The parties appeared before the Court and produced the agreement and applied for an order of reference, and the Court thereupon made the order:

Held, that as the said guardian was in Court and assented to the said application no injustice had arisen, and the said order and the subsequent arbitration proceedings and the award made therein should not be set aside because of the omission to sign the said application by the minor's guardian-*ad-litem*.

Where the Court has rejected objections, under section 15 of schedule II of the Code of Civil Procedure, 1908, to an award and passed a decree under section 16 of that schedule, and an application under section 115 of the Code for revision of that decree is rejected on merits, an order under O. 47, R. 1 of the Code, for a review of the order refusing revision is not justified in the absence of circumstances which would bring the case within the provisions of the said section 15 of schedule II which would enable the Court to set aside the award. *Thakur Umed Singh v. Rai Bahadur Seth Sobhag Mai Dhadha* 130

Assam Land and Revenue Regulation, Sec. 28 Proviso, cl. (2), scope of; see Revenue, assessment of 504

—, Sec. 28 Proviso, cls. (2) and (4), construction of; *see Revenue, assessment of* 506

Assessment of lands excepted from the Permanent Settlement—Assam Land and Revenue Regulation, Sec. 28 Proviso, cl. (a); see Revenue, assessment of 504

Attachment before judgment, effect of—Civil Procedure Code, Sec. 64, O. 38, R. 10, scope of.

The object of the provisions in section 64 of the Code of Civil Procedure is to secure to the creditor protection of his rights obtained by the attachment against all subsequent acts of his debtor which may imperil his obtaining the fruits of his decree through the attachment which has been effected. A creditor can only attach the right, title and interest of his debtor at the date of the attachment, and he has no ground for complaining if prior to his attachment the debtor has created an obligation against him touching the property.

The provision in Order 38, R. 10 of the Code is not limited to rights *in rem*.

A conveyance, therefore, of a property executed after its attachment before judgment by a creditor, in pursuance of a contract dated before the attachment, should prevail, inasmuch as it was merely carrying out an obligation which was incurred prior to the attachment. *Madam Mohan De Sarkar v. Rebat Mohan Podder* 115

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Attorney's right in respect of his lien—Change of attorney ; <i>See</i> Lien	326
Attorney and client— <i>Attorney giving notice to withdraw from the case—Reasonable notice—Solicitor, when can withdraw from a case—Good grounds, what are.</i>			

Even if the conduct of the client is such as makes it possible for the solicitor to continue to act, the client is entitled to reasonable notice of his application for withdrawal.

Giving notice that the attorney would apply to be discharged from the case, which application came on for disposal the next day, was not giving reasonable notice of his withdrawal from the case to his client.

Per Mookerjee, J.: A solicitor retained to conduct an action may withdraw from it on good grounds. Such good grounds include misconduct of an offensive character or such misbehaviour on the part of his client as makes it impossible for a self-respecting solicitor to continue to act for him. *Prabhu Lal v. Kumar Krishna Dutt* ... 473

Attorney and client—What amounts to discharge of attorney ; <i>See</i> Lien	326
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Benamidar— <i>True owner adjudicated insolvent—Benamidar transferring to third person—Third person, rights of—Notice—Presidency Towns Insolvency Act (III of 1909), Sec. 57—Title by estoppel, if can be claimed against Official Assignee.</i>			
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In order to make a transaction with the insolvent, which takes place after the presentation of an insolvency petition by or against the debtor, valid under section 57 of the Presidency Towns Insolvency Act, two things are necessary : (a) the transaction must take place before the date of the order of adjudication ; and (b) the person with whom the transaction takes place must have no notice of the petition.

In the present case, as these conditions were not satisfied, the transaction was held to be invalid as against the Official Assignee.

When there is a fictitious transaction with regard to a property, no title passes, notwithstanding the execution and registration of the documents ; the transaction may fittingly be described as essentially a mark of the real ownership. A *benamidar* is in no sense an owner of the property.

Per Mookerjee, J.:—The title by estoppel which might have been claimable against the owner by reason of his conduct, cannot, after his adjudication, be claimed equally as against the Official Assignee by a person whose title has accrued after the adjudication order.

Benamidar—(Contd.).

In a limited sense, the Official Assignee may be deemed the representative of the insolvent, but he cannot be regarded for all purposes as his successor in interest, for the property is vested in him with a view to paralyse the hand of the insolvent, who becomes by operation of law incompetent to deal with the estate to the detriment of his creditors. *Re Gobordhone*

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Certificate — <i>Indian Penal Code (Act XLV of 1860), Secs. 197, 198—Civil Procedure Code (Act V of 1908), O. 21 R. 2—“Certify”—Decree-holder, if to certify payment—Decree-holder, statement of, if admissible as such a certificate.</i>	
<p>A, purporting to represent a decree-holder in a certain suit, signed and filed a petition in the Court, stating, contrary to the fact, that B, the judgment-debtor, had paid off the decretal amount to the decree-holder through him, her ammukteer, B, was found to have abetted A in so doing :</p> <p><i>Held</i>, that A was not guilty of offences under Secs. 197 and 198 of the Indian Penal Code and B could not be convicted for abetting.</p> <p>The certificate, in respect of which a man may be punished under Secs. 197 and 198 of the Indian Penal Code, if it is false to his knowledge or belief, must be either (a) one that is required by law to be given or signed, or (b) that relates to any fact of which such certificate is by law admissible in evidence. One or other of these requirements must be fulfilled before a man can be dealt with under these sections.</p> <p>A decree-holder is not bound to certify in writing a payment or adjustment of his decree. It may be done orally either by himself or any person who can properly represent him. There is no provision of law which requires him so to certify by “issuing or signing a certificate.”</p> <p>A statement of the decree-holder or his agent as to payment or satisfaction is not admissible in evidence as such a certificate, that is, without further proof.</p> <p>The word ‘certify’ in O. 21 R. 2 of the Code of Civil Procedure means primarily to assure, to vouch, to make certain. Every act of certifying does not necessarily result in a ‘certificate,’ meaning thereby a signed document vouching a particular fact. The word ‘certificate’ may be used as synonymous with ‘certification’ but that is not its meaning in Secs. 197 and 198 of the Indian Penal Code. <i>Mahabir Thakur v. The King-Emperor. Ramkumar Pattalk v. The King-Emperor</i> ...</p>	
‘Certificate’, if may be used as synonymous with ‘certification’—Penal Code, Secs. 197, 198 ; <i>See Certificate</i>	423
‘————’, nature of—Penal Code, Secs. 197, 198 ; <i>See Certificate</i> ...	423

Certification—Payment out of Court to decree-holder—Civil Procedure Code O. 21 R. 2.

A decree-holder applied for execution of his decree, and in his application relied upon a payment by a judgment-debtor as saving limitation. Upon an objection having been taken that the application was barred by limitation inasmuch as the payment was not certified :

Held, that the decree-holder might either apply to certify payment before execution or might do so on his application for execution of the decree. Under order XXI, rule 2 of the Code of Civil Procedure the certification need not be a certification on some days or at some different time from that on which the application for execution is made. **Esuff Zeman Serkar**

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'Certify', meaning of—Civil Procedure Code (1908), O. 21 R. 2 ; See Certificate 421

Cess, arrears of—Interest—Kabuliat—Special contract to pay rent ; See Cess Act 603

Cess Act, (IX of 1880, B.C.), sections 42 cl. (3), 47, "construction of—Kabuliat—Special contract to pay rent—Cess, arrears of—Interest.

Where by a kabuliat executed before the passing of the Bengal Tenancy Act or the Cess Act, rent was payable by the tenure-holder in three kists, and the latter undertook to pay any cesses which might be imposed by Government, and it was provided that no interest should be chargeable on arrears of rent until the end of the Bengali year :

Held that, the landlord was entitled to recover interest upon cesses from the dates on which they fell due, *i.e.*, the dates of the kists on which the rent was payable under the kabuliat, inasmuch as the provisions of section 47 of the Cess Act cannot be subject to the special contract between the parties made in the kabuliat in the matter of rent. **Radhika Mohan Roy v. Maumatha Nath Mitter** 603

Cession—Enforceable rights after cession—Burden of proof—Viramgam Kasbati's Tenure—Patta—Bombay Act VI of 1862—Bombay Act VI of 1888.

After a cession of territory to British rule the only enforceable rights against the sovereign are those conferred by him after the cession either by agreement express or implied or by legislation. An implied agreement conferring rights may be established by evidence of recognition of rights existing before cession and of an election express or implied to be bound by them.

Seemle : The burden of establishing the existence of an enforceable right is upon the subject.

Kasbati of the village of Chharodi in pargana Viramgam, *held*, upon the facts, to have no proprietary right in the village and not to be legally entitled at the end of the term of his patta to have a fresh patta granted to him. The pattas granted from time to time were in the nature of leases and were not merely jamabandi pattas.

Bombay Act VI of 1862 does not apply to Kasbatis and a Kasbati's rights

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under Bombay Act VI of 1888 are subject to and limited by his patta.
The Secretary of State for India in Council v. Bal Rajbal 1

Civil Procedure Code (1882), Secs. 248, 249, 637—Master—Question, determination of—Judicial Act—Revivor of decree; See Decree, execution of 645

————— (1882), Sec. 373—Withdrawal of suit, order for—Order passed on the ground that the plaintiff was unable to adduce all the evidence at the first hearing—Fresh suit brought in pursuance of that order, if maintainable; *See Res judicata* 489

————— (1882), Sec. 462—Compromise on behalf of a minor—Absence of leave of Court, effect of; *See Trust* 337

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————— (1908), Sec. 48 Sub-sec. (1) cl. (a)—Mortgage decree on consent—Time, running of—Personal decree; *See Limitation* ... 573

————— (1908), Sec. 48 Sub-sec. (1) cl. (a)—Preliminary and final decrees—Final decree operative; *See Limitation* 573

————— (1908), section 60—"Saleable," meaning of.

The word 'saleable' in section 60 of the Code of Civil Procedure means saleable by auction at a compulsory sale under the order of the Court, and not transferable by act of parties. **Keshab Chandra Pramanick v. Ajahar Ali Biswas** 428

————— (1908), Sec. 64, object of; *See Attachment before judgment, effect of* 115

————— (1908), Sec. 98—Reference, when can be made; *See Judgment, if valid* 592

————— (1908), Sec. 100—Erroneous view of legal rights of the parties; *See Second Appeal* 281

————— (1908), Sec. 100 (c)—Substantial error or defect of procedure—Deciding a case upon part only of the evidence; *See Second Appeal* 600

————— (1908), Sec. 102—Suit claiming rent and damages for breach of contract—Bengal Tenancy Act, Sec. 153; *See Second Appeal* 557

————— (1908), Sec. 104, scope of—Cases where cl. 15 of Letters Patent inapplicable; *See Appeal* 443

————— (1908), Sec. 115—Error of law.

The High Court cannot interfere under section 115 of the Code of Civil Procedure on the ground that the lower Court has committed an error of law. **Jamadar Singh v. Raja Jagat Kishore Acharya Chowdhury** ... 557

(1908), Sec. 115, O. 47 R. 1, Sch. II. Paras 1, 15,

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_____ (1908), O. 3 R. 4—High Court General Rules and Circular Orders, Ch. XI R. 45 (e). Vol. I. p. 301—Acceptance of vakalatnama, if to be in writing; <i>See</i> Vakalatnama ...	297
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_____ (1908), O. 11., if applies to probate proceedings—Probate Court, if can direct executor to make full discovery of the assets of the deceased by an affidavit; <i>See</i> Probate Court, power of ...	480
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_____ (1908)* O. 21 R. 2—'Certify', meaning of; <i>See</i> Certificate ...	428
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_____ (1908), O. 21 R. 46(3), scope of; <i>See</i> Suit, maintainability of ...	163
_____ (1908), O. 21 R. 46(3) and Rules of Supreme Court in England, O. 45 R. 5, difference between; <i>See</i> Suit, maintainability of ...	163
_____ (1908), O. 23, R. 3, scope of— <i>Suit, adjustment of—Arbitration, reference to—Agreement, enforcement of.</i>	
An agreement by the parties to a suit to refer a dispute to arbitration does not come within the scope of order XXIII, rule 3 of the Code of Civil Procedure, inasmuch as such an agreement does not finally dispose of the suit as there is still a great deal of judicial work to be done, evidence has to be considered and weighed, and a judicial opinion arrived at.	
Where, however, the parties presented a petition to Court, and agreed that the case should be finally disposed of in one way if a simple fact was found to exist, and in another way if it was found not to exist, the agreement came within the terms of order XXIII, rule 3 of the Code, as no further judicial action was necessary; and the agreement being capable of enforcement the losing party should not be entitled to repudiate it after the fact, on which it depended, had been ascertained.	
_____ <i>Khobhari Sah v. Jhaman Sah</i> ...	482
_____ (1908), O. 26, R. 10—Commissioner's Report, rejection of—Fresh investigation ...	600
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Contract—Construction—Admissibility of extrinsic evidence—Rate of payment for work done under a contract—Over-all rate, effect of.	
The rate of payment for work done under a written contract to execute it is determined by the terms of the contract, and consequently extrinsic evidence as to the rate of payment allowed for such work to another contractor or to same contractor under another contract is irrelevant and inadmissible.	
Under the terms of the contract in this case the schedule of rates of payment specified under one head a certain rate for carting permanent way material and under another head the rate for carting explosives, and the note referred to in the schedule fixed conditions of carriage of cement and explosives. The question in dispute was as to the rate of payments for carting cement ;	

Contract—(Contd.).

Held, that cement was permanent-way material and the rate of payment for carting cement was that specified in the schedule for carting the permanent-way material; that the note did not fix the rate of payment, and the conditions which attached to the carriage of cement were not the same as those which attached to the carriage of explosives; and that although both explosives and cement were to be carried under special instructions and the carriage of cement might consequently be more costly than other permanent-way materials, yet the rate of carting permanent-way materials was fixed as an over-all price and the fact that one article might be more costly to handle than another did not affect the rate of payment under the terms of the contract. *Seth Jaswant Rai v. The Secretary of State for India in Council* ...

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Contract—Construction—Principle on which a stipulation or undertaking is to be implied in a written contract.

The law recognises the fact that men assume that the words of the contract will be understood in their trade meanings, and that the terms of their agreements will be governed by the well-recognised usages of the callings to which they relate, and it necessarily looks to these usages to ascertain the real thought of the contract. It finds that merchants do not write all the terms of their contracts, but rely upon the knowledge and good faith of one another as to matters so well-known that special reference to them would be burdensome and unnecessary, and that they accordingly agree upon many of the terms of their contracts by mere silence; what these terms are, must be shown by parol evidence. *Lakurka Coal Company, Limited v. Jammadass Bhagwandass* ...

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————— **Contract for sale of lands—Original contract varied by mutual consent—Contingent contract—Contingency not happening, effect of; See Specific performance**

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————— **Intention to abandon—Demand of return of deposit; See Corporate body**

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————— **Right of buyer on breach of warranty in respect of goods not ascertained—Indian Contract Act (IX of 1872), Sec. 118—Goods not in accordance with contract—Goods, when to be rejected—Reasonable time—Burden of proof.**

A contract was made on the 23rd April 1914, for 125 bales of jute. It was guaranteed to yield after cutting 70 per cent. good sacking warp and the payment was to be made when the buyers (defendants) received the documents from the Railway Company, the vendor (plaintiff) was to receive 90 per cent. of the price and the balance 10 per cent., when the goods were actually delivered. The documents were received by the defendants from the Railway Company on the 28th July and the goods were actually delivered to them on the 31st July. The goods were found to be inferior in quality. The defendants did not adduce sufficient evidence that they definitely rejected the goods before the 22nd August. In a suit for recovery of price of 125 bales of jute :

Held, that the goods not being in accordance with the contract, the

Contract—(Contd.).

- defendants, if they chose, could have rejected them when tendered or kept them for a time reasonably sufficient for examining and trying them, and then refused to accept them.

That the burden lay upon the defendants to prove that they did in fact reject the goods, and as they failed to discharge such onus, they were liable for the price. *Kissendoyal Jitsaria v. Askaran Chowdhull* ...

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—————*Sale of shares—Breach—Non-payment—Measure of damages—Provision that on breach by the buyer the seller had the option to resell by auction, effect of—Notice of intention to exercise the option—Indian Contract Act (IX of 1872), section 107.*

The measure of damages for breach of a contract for sale of negotiable securities, for instance shares, is the difference between the contract price and the market price at the date of the breach, with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach. The seller is not bound to reduce the damages, if he can, by a subsequent sale at better prices. If the seller holds on to the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

The fact that by reason of the loss of the contract which the contractee failed to perform, the contractor obtained the benefit of another contract which was of value to him, does not entitle the contractee to the benefit of the latter contract.

A contract for sale of shares to be delivered on a certain date contained a term providing that in the event of the buyer not making payment on the date of delivery the seller should have the option of reselling the shares by auction, and any loss arising should be recoverable from the buyer. On failure of the purchaser to take delivery, the buyer gave notice of his intention to sell the shares by auction, but did not carry out his intention :

Held, that upon breach by the purchaser his contractual right to the shares fell to the ground, and there arose a right in the seller to damages ; that the stipulation in question meant that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified ; and that if the seller availed himself of that option he was not selling the purchaser's shares with a consequential obligation to account to him for the price but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price.

Held, also, that the said notice by the buyer did not amount to an election to take a measure of damages to be arrived at by a resale, and that section 107 of the Indian Contract Act had no application. *A. K. A. S. Jomal v. Moolia Dawood Sons & Company*

Contract—(Contd.).

—, *breach of*—Contract for sale and delivery of goods in instalments
Construction of—Damages, measure of—Last period not elapsed when
the action brought or cause tried.

A contract provided that the shipment would be made by steamers during July to December, 1914, and that any shipment might be made within 7 days after the expiry of the particular months. After this contract had been made, war was declared on the 4th August, 1914; 6 days later, the seller wrote to the buyer and asked him to bear the extra war insurance. The purchaser replied that he was bound by the contract and was prepared to carry out all and only such objections as were included in its terms: The result of further correspondence was that on the 18th August, 1914, the seller intimated to the purchaser that he had definitely cancelled the contract:

Held, that, on the construction of the contract and from the circumstances of the case, the buyer had the right to demand delivery of the goods during the months from July to December.

When the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for non-delivery. The measure of damages is the estimated loss directly resulting from the seller's breach of contract. Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they should have been delivered, notwithstanding that the last period had not elapsed when the action was brought or when the cause was tried.

Per Mookerjee, J.—An agreement to accept delivery by instalments, may, in the absence of an express agreement, be inferred from the conduct of the parties and circumstances of the case.

In the absence of any indication to the contrary, the instalments must be deemed to have been intended to be distributed rateably over the period appointed for the delivery of the whole quantity of goods.

If the damages have been assessed on erroneous principle by the lower Court, the judgment cannot stand; but it does not follow that the appellant is entitled to a reduction of the amount specified in the decree; he must satisfy the Court that on the correct principle he is not liable for the amount decreed against him. *Bhaskaram Thakursidass v. Ezekiel*

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Sec. 69—Personal liability—Liability imposed on property—'Person bound by law to pay'—'Interested in the payment of money'—Rent payable by the judgment-debtor—Execution purchaser, if can recover—Execution purchaser, liability of, extent of.

The plaintiff sued to recover from the defendants the whole amount paid by him to save the property, a portion of which was held by him as a tenant under defendant No. 1. There was an alternative case, viz. that if the plaintiff was held liable to contribute, then, a decree for proportionate amount might be passed against the defendants.

The primary Court held that the plaintiff was a co-sharer and liable to contribute, and on that footing gave a modified decree to the plaintiff. The plaintiff did not appeal against that decree. On second appeal by defendant No. 2.

Held, that as the suit was one for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer, it was exempted from the cognizance of Small Cause Courts Act under article 41 of the second schedule of the Provincial Small Cause Courts Act, and a second appeal lay to the High Court.

Section 69 of the Contract Act was intended to include the case not only of personal liability, but all liabilities to payments for which owners of lands were indirectly liable, those liabilities being imposed upon the lands held by them.

Plaintiff and defendant No. 1 were co-sharers of a taluk. The share of the defendant No. 1 was purchased by defendant No. 2 in execution of a mortgage decree. Prior to the purchase of the defendant No. 2, the landlord of the taluk had obtained a decree for arrears of rent of the taluk and after the purchase by defendant No. 2 put up the taluk to sale in execution of the rent decree, when the plaintiff deposited the entire amount due to the landlord and saved the taluk :

Held, that defendant No. 2 was a person "bound by law to pay" within the meaning of section 69 of the Contract Act although his liability was not a double liability like that of the plaintiff.

That the plaintiff was a person interested in the payment of money within the meaning of section 69, as he was "bound by law to pay" by reason of the liability attaching to the land.

That defendant No. 2, in the absence of anything to denote the contrary, purchased the land charged with the rent which was due in respect of it at the time of its purchase and there being no privity between him and defendant No. 1, the judgment-debtor, he could not recover from the latter the money which he was obliged to pay for the rent so due at the time of the purchase.

That defendant No. 2 was liable only to the extent of the share purchased by him. *Chandradaya Sen v. Bhagaban Chandra Sen*

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Conveyance of property executed before its attachment before judgment by a creditor, in pursuance of a contract dated before the attachment, effect of ; *See* Attachment before judgment, effect of

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Corporate body—Title to land, if passes by admission—Bengal Local Self-Government Act (III B. C. of 1885), section 138 (d), rules framed under—Rules 93, 98—'Regulating the power,' it includes regulating the mode of transfer—Immovable property vested in District Board, how to be transferred—Statute, construction of—Interpretation at the time of enactment—Rule 98 mandatory—Mandatory enactments, if and when directory—Suit, if liable to be dismissed—No title—Contract, when rescinded—Party, when can refile from the Contract—Evidence—Corporation, if can retain money—Cross-objection—Appellant—'Party affected'—Civil Procedure Code (Act V of 1908), O. 41, Rr. 22 (3), 33—Limitation Act (IX of 1908), Sch. I, Art. 113.

Title to land cannot pass by a mere admission when the statute requires a de .

Rule 98 of the statutory rules made by the Lieutenant-Governor under section 138(d) of the Bengal Local Self Government Act, is to be read along with Rule 93 and is mandatory and not directory. Hence no immovable property vested in a District Board can be validly sold except with the previous approval of the Local Government and except by an instrument under the common seal signed by the Chairman and by two members of the Board.

The expression 'regulating the power' in section 138(d) of the Bengal Local-Self Government Act, when applied to a Rule made thereunder, is comprehensive enough to include not only rules which restrict the power of alienation to property of specified value and kind, but also rules which regulate the mode in which the alienation is to be effected. A power to regulate assumes the conservation of the thing which is to be made the subject of regulation.

Rules 93 and 98 made under section 138(d) are not *ultra vires*.

The Courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it, although such interpretation has not, by any means, a controlling effect upon the Courts and may be disregarded for cogent and persuasive reasons.

No universal rule for the construction of statutes can be laid down to determine whether a mandatory enactment shall be considered directory only, or obligatory with an implied nullification for disobedience; it is the duty of Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.

Where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it is neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred. On the other hand, where a public duty is imposed and the statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions

Corporate body—(Contd.).

are intended to be directory only, when injustice or inconvenience to others, who have no control over those exercising the duty, would result, if such requirements were deemed essential and imperative. The test is, do the statutory prescriptions affect the performance of a duty or do they relate to a privilege or power?

When a public body or a company is established by statute or incorporated for special purposes only, and is altogether the creature of statute law, the prescriptions for its acts and contracts are imperative and essential to their validity.

A suit need not be dismissed, merely because the authority for its institution, such as a certificate under the Pensions Act, 1861, or section 78 of the Land Registration Act, or, section 60 of the Bengal Tenancy Act, or section 4 of the Succession Certificate Act, is not produced with the plaint. But it is otherwise, where the plaintiff had no title at all at the date of the institution of the suit.

Where there was an offer by the District Board to A to reconvey the land to him upon payment of Rs. 25 as actual expenses of acquisition, and the offer was accepted by him by a deposit of the amount, an enforceable contract was constituted. As the contract was for re-transfer of the land for Rs. 25, neither Rule 102 nor Rule 103, which applies respectively to contracts in excess of sums of Rs. 50 and Rs. 500, had any application.

The strict rule of the ancient Common Law was that a corporation could only act under its seal and was not bound by written contracts not under seal. This rule, however, was relaxed in many cases at an early date and where a corporation is acting within the scope of the legitimate purposes of its institution, even parol contracts made by its authorised agents raise implied promises, for the enforcement of which an action may well lie, specially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the corporation.

The exception based upon the doctrine of part performance cannot be applied where the contract is, by statutes, positively required to be under seal.

One contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former; but, if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together; where the new contract is consistent with the continuance of the former one, it has no effect unless or until it is performed.

Where parties enter into a contract which, if valid, would have the effect by implication, of rescinding a former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect by implication, of affecting their rights in respect to the former transaction.

Corporate body—(Contd.).

Where one party, by acts and conduct, evinces an intention no longer to be bound by the contract, the other party will be justified in regarding himself as emancipated from continued liability under the contract.

A clear and precise evidence of a mutual intention to determine and abandon the contract is required by Court.

The demand of a return of the deposit is not by itself conclusive evidence of an intention to abandon the contract. But, where such demand is accompanied by other conduct consistent only with an intention to rescind, the vendee who has so acted cannot later on seek specific performance, for a non-existent contract cannot be specifically enforced.

A suit for specific performance of a contract is to be brought under Art. 113, Sch. I of the Limitation Act, within 3 years from the date when the performance is refused.

Where a corporation receives money or property under an agreement which turns out to be *ultra vires* or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation. The relief is granted, not upon the illegal contract, nor according to its terms, but on an implied contract of the corporation to return, or failing to do that, to make compensation for property or money which it has no right to retain; to maintain such an action is not to affirm but to disaffirm the illegal contract.

A respondent can urge cross-objection against another respondent, if he is a party affected. In this respect O. 41, R. 22 (3) of the Code of Civil Procedure has materially altered the law. *Mathura Mohan Saha v. Ram Kumar Saha* 26

Corporation, if can retain money—Money received under an agreement which turns out to be *ultra vires* or illegal; *See Corporate body* 26

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Costs are in the discretion of the trial Judge and this discretion should not be interfered with by the appellate Court, unless good cause is shown. *Kali Dassee Dassee v. Nobokumari Dassee* 606

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Criminal Procedure Code, Sec. 35 Sub-sec. (1), scope of—Several sentences of different kinds—How to run ; See Sentence defective in form ...	596
————, Sec. 108, order under—Findings necessary to sustain the order ; See Unlawful assembly ...	108
————, Sec. 108 (b), conviction under—Evidence—Intention, finding of, if essential ; See Penal Code, Sec. 153 A ...	105
————, Sec. 145—Auction-purchaser, delivery of possession to—Possession through Court—Judgment-debtor in actual possession—Criminal Procedure Code (Act V of 1898), Sec. 145.	
A judgment-debtor should not be allowed in a proceeding under section 145 of the Code of Criminal Procedure to retain possession against his decree-holder auction-purchaser, who has actually been given possession against him by a civil Court, and to assert that possession and drive the decree-holder auction-purchaser back to the civil Court for a further declaration of his rights. <i>Atal Hazra v. Uma Charan Chongdar</i> ...	555
————, (Act V of 1898) section 408—Sentences passed by Assistant Sessions Judge—Appeal, if lies to Sessions Court or to High Court.	
Where an Assistant Sessions Judge passes sentences upon an accused each of which is four years or under, and they are ordered to run concurrently, the appeal from the conviction and sentence lies to the Sessions Court and not to the High Court. <i>Lakhmi Ram Gogol v. King Emperor</i> ...	595
Cross-objection—One respondent, when can urge against another ; See Corporate body ...	26
Damages—Contract for sale of land—Contingent contract—Contingency not happening ; See Specific performance ...	606
————, claim for ; See Rent, enhancement of ...	209
————, measure of—Contract for sale and delivery of goods in instalment—Last period not elapsed when the action brought or cause tried ; See Contract, breach of ...	62
————, measure of—Sale of share—Breach—Non-payment—Provision that on breach by the buyer, the seller had the option to resell by auction, effect of ; See Contract ...	137
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————, suit for—Principal and agent—Unauthorised fraudulent act of agent—Master's benefit—Illegal attachment and sale of movable property.	
<i>Per Curiam</i> : Acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent, even though it is not for his benefit and even though he did not in fact authorise the commission of the fraudulent act.	
X and Y obtained a decree for money against four brothers A, B, C and D. The decree-holders applied for execution against D alone by attachment and sale of his movables. The warrant of attachment was issued in due	

Damages—(Contd.)

course, but the peon, on the identification of P, the agent of the decree-holders, attached three heads of cattle which belonged to B. B protested and tendered the decretal amount, but the peon, who was in collusion with P, had the cattles sold for an insignificant sum. P acted in this manner on account of ill-feeling which he bore towards the judgment-debtors. In a suit for damages by the judgment-debtor against the decree-holders :

Held, that the attachment and sale of movable property were illegal.

That the decree-holders were liable for damages for the fraudulent conduct of their agent. *Sher Jan Khan v. Alimuddi* 225

—assessed on erroneous principle—Effect of—Reduction of amount specified in the decree ; *See* Contract, breach of 62

Debtor and creditor—Transfer of Property Act (IV of 1882), Sec. 53—Suit to set aside deed as being void as delaying or defeating creditor—Deed executed for good consideration—Preference by debtor to one creditor rather than another where debtor retains no benefit for himself.

In a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts.

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave others unpaid.

Where a transfer was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it could not be impeached under section 53 of the Transfer of Property Act, though the plaintiff, who was a creditor, was a loser by payment being made to the preferred creditor (a defendant). *Masahar Sahu v. Lala Hakim Lal* 406

Decree—Application for transmission of decree—Revivor—Limitation ; *See* Decree, execution of 645

—Rescission, suit for—Fraud ; *Res judicata* 55

—, execution of—Limitation, question of, to be decided by which Court ; *See* Execution of decree 641

—, execution of—Limitation Act (IX of 1908), Sch. I. Art. 183—'Revivor'—Application for transmission of decree—Civil Procedure Code (Act XIV of 1882), Secs. 248, 249, 637—*Belchamber's High Court Rules*, 345, 370—Master, if can determine question under sec. 249—Judicial act—Law of limitation, applicability of, to proceeding.

Held, that upon the application for transmission of the decree under section 223 of the Code of Civil Procedure of 1882, a notice under section 248 could not properly be issued, that such notice, though issued,

Decree—(Contd.).

did not by itself operate as revivor of the decree, and that there was not in fact and could not in law be such a determination by the Master under section 249 as would operate to revive the decree.

The determination of a question under section 249 of the Code of Civil Procedure of 1882, whether a decree should or should not be executed, is a judicial act. Such judicial act cannot be delegated to a Master under section 637 of the Code of Civil Procedure, 1882.

Rules 345 and 370 of the Rules of the High Court set out in Mr. Belchamber's Rules and Orders are to be read as modified by the Civil Procedure Code of 1882.

To constitute a revivor of a decree, there must be, expressly or by implication, a determination, made with jurisdiction and by a competent tribunal, that the decree is still capable of execution and the decree-holder is entitled to enforce it.

The substance and not the form of the matter must be looked at.

Per Sanderson, C. J., Chitty and N. Chatterjee JJ: The word 'revivor' in article 183, Sch. I of the Limitation Act does not mean the same thing as one or more of the matters which are mentioned in Art 182, sub-clauses 5 and 6.

Per Mookerjee, J: Article 183 should not be interpreted with reference to article 182, Sch. I of the Limitation Act.

Per Woodroffe, J:—An order for transmission is a ministerial act and, not a revivor.

An order for transmission of decree as such is not an order on an application for execution though it is an order in execution. It is a proceeding taken with a view to further action by way of execution elsewhere on which action, unless previously determined, the question of the right to execute the decree is decided.

Per Woodroffe and Mookerjee, JJ: An application for transmission of decree is not a revivor.

Per Mookerjee, J: The law of limitation applicable to a proceeding is, unless there is a distinct provision to the contrary, the law in force at the date of the institution of the proceeding.

An application for transfer of a decree is in no sense an application for execution.

The issue of a notice under section 248 of the Code of Civil Procedure of 1882, on the basis of the application for transmission of the decree, is not in conformity with the Code of 1882. *Chatterpnt Singh v. Salt*

Sumari Mal 645

—, if can be impeached on the ground of fraud by separate suit; *See*
Ejectment, suit for 587

— indivisible—Effect of order setting aside decree against one defendant
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Decree-holder, if bound to certify in writing a payment or adjustment of his
decree; *See* Certificate 423

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statement of, if admissible as such a certificate of payment or satisfaction—Further proof, if necessary ; See Certificate ...	423
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Defence—Impeaching <i>ex parte</i> decree on the ground of fraud—Such defence, if can be raised for the first time in appeal ; See Ejectment, suit for ...	587
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Depository, suit against— <i>Limitation Act, Sch. I., Arts 145, 49, 115—Gold entrusted to make ornament—No delivery of ornament.</i>	
Article 145, Schedule I of the Limitation Act is applicable to a claim for reconveyance of a certain quantity of gold, which was made over by the plaintiff to the defendant for a specific purpose not carried out.	
The article applies even when the property is not recoverable in specie.	
It does not cease to be applicable merely because the defendant, after demand, wrongfully refuses to return the property ; such refusal does not bring into operation articles 48 and 49.	
Even if articles 49 and 115, schedule I of the Limitation Act were applicable, the suit was not barred, as the cause of action arose within three years from the date of the institution of the suit. <i>Gangaharl Chakrabarti v. Nabin Chandra Banikya</i> ...	
Devise of residuary estate ; See Will, construction of ...	145
Duties of appellate Court in reversing a conclusion of fact ; See Principal and agent ...	241
Ejectment— <i>Bengal Tenancy Act (VIII of 1885), Sec. 167—Purchaser seeking to annul the sub-tenancy—Sale of superior tenancy for arrears of rent—Adverse possession against sub-tenant—'Incumbrance'—Notice.</i>	190
When a person has, by adverse possession against a sub-tenant, acquired a statutory title to a portion of the lands comprised in the sub-tenancy, he has an interest in the sub-tenancy, so that when, on a sale of the superior tenancy for arrears of rent, the purchaser seeks to annul the sub-tenancy as an "incumbrance," such person stands in the position of an "incumbrancer" and is entitled to notice under section 167 of the Bengal Tenancy Act. <i>Bhushan Chandra Ghose v. Srikantha Banerjee</i> ...	
——— <i>Lessor not a de facto landlord—Lessee not given possession—Principle of Binad Lal Pakrashi's case, if applicable—Judgment in criminal case, when admissible.</i>	485
The principle laid down in <i>Binad Lal Pakrashi's</i> case viz., that an agricultural tenant, who enters upon the land, whether it be firm or alluvial, and holds under a <i>de facto</i> proprietor <i>bona fide</i> , is entitled to be treated as a raiyat, although the <i>de facto</i> proprietor is subsequently proved to be not the real owner, is an encroachment upon the ordinary rule of law that a grantor is not competent to confer upon the grantee a better title than what he himself possesses, and must be cautiously	

Ejectment—(Contd.).

applied and is not to be extended. It is not applicable to zerait lands. In order to make the principle applicable, the lessor must be the *de facto* landlord in possession and must have placed the lessee in possession of the land.

A person who obtained a lease of agricultural land from one who had no title to it and was not put in possession of it, has no enforceable claim even as against one who fails to establish his alleged title.

A judgment in a criminal case is admissible in evidence to show what order was made, who the parties to the dispute were, what the land in dispute was and who was held entitled to possession. *Kishore Nath Chakrabarti v. Mahomed Wafiz* 563

Non-transferable occupancy holding—Purchaser of a share.

A purchaser of a share of an occupancy holding, is entitled to possession even as against the landlord, inasmuch as the tenancy is not determined and interposes a barrier between him and the landlord. *Purna Chandra Trivedi v. Chandra Mohini Dass* 304

Notice to quit by one of two joint Receivers, if valid—Joint Receivers, duty of—Direction in order of appointment—Joint tenants, demise by—Contract Act (IX of 1872), Sec. 200—Ratification.

A notice to quit given by one of two joint Receivers, on behalf of both, is not a valid notice and cannot terminate a tenancy.

The doctrine that where there is a demise by joint tenants, one may give notice on behalf of all, does not apply to the case of joint Receivers.

If the notice to quit is given by an authorised person, a subsequent ratification will not make it effectual, since the notice must be one which is in fact binding on the landlord when it is served.

When two persons are appointed joint Receivers, unless there is a direction or an indication to the contrary in the order of appointment, the intention of the Court must be deemed to be that they, as officers of the Court, should meet and discuss together the questions, which come before them for determination in the course of the management of the estate, and that in all matters which require the exercise of judgment and are not purely ministerial, the action taken should be the result of their united deliberation. The very object of appointment of joint Receivers would be defeated, if one were held competent to delegate his functions to the other.

Rights of property cannot be changed retrospectively by ratification of an act inoperative at the time; to make an act rightful which otherwise would be wrongful, must be at a time when the principal could still have lawfully done it himself. *Cassim Ahmed Molla v. Eusuf Haji Ajam Popardi* 453

Suit for—Mortgage of entire property by some of the sharers—Suit on mortgage—Death of one of the mortgagors before suit—Representative, suit against—Representative interested in his own right—Ex parte decree—Sale in execution—Symbolical delivery of possession—Effect of—Suit by execution-purchaser for possession, if maintainable—Civil Procedure

Ejectment—(Contd.).

Code (Act V of 1908), Secs. 11, 47—Mortgage, validity of, if can be raised by stranger—Constructive res judicata—Decree, if can be impeached on the ground of fraud by separate suit—Objection as to invalidity of decree, if can be raised for the first time in appeal—Transfer of Property Act (IV of 1882), Sec. 44—Execution-purchaser, a stranger, if can be placed in actual possession of a dwelling house.—Auction-purchaser, remedy of.

An *ex parte* decree can be impeached on the ground of fraud by way of defence to the claim of the plaintiff. Such a defence cannot be raised for the first time in appeal, if no issue was directed on the point in the first Court.

The question of the validity of a mortgage as against one who is not a party thereto, cannot be properly raised and determined in a suit to enforce the security: *Jaggewar v. Bhuban* and *Bhaja v. Chuni Lal* referred to. The position is not altered by the circumstance that one of the mortgagors was dead at the commencement of the suit and one of his representatives is a person interested in his own right in the hypothecated property, adversely to the mortgagor. The fact that such a representative did not impeach the validity of a mortgage in a suit on the mortgage brought against him as the representative of the mortgagor, does not preclude him under the doctrine of constructive *res judicata* from urging such plea in a suit for possession brought against him by the purchaser in execution of a mortgage decree.

Where the purchaser in execution of a mortgage decree, of a share of a dwelling house belonging to an undivided family, is not a member of the family, the Court can either direct delivery of possession by partition in execution proceedings or leave him to his remedy by a separate suit for partition.

The obtaining of a symbolical delivery of possession after the confirmation of a sale is operative against the judgment-debtor, who from the date thereof becomes a trespasser. A suit by the execution-purchaser against the judgment-debtor for recovery of possession is not barred by section 47 of the Code of Civil Procedure. *Girja Kanta Chakrabarti v. Mohim Chandra Acharji*

587

—, *suit for—Repossession sale—Adverse possession—Plaintiff to succeed on his own title—Defendant not able to establish title to all lands in his possession.*

There were two contiguous estates A and B, held by X and Y respectively. X annexed a portion of B and professed to hold it as included in A, till the title of B was extinguished. X made default in the payment of Government revenue and his estate A was sold :

Held, that the Collector only sold the estate A as it stood at the time of the permanent settlement and did not put up to sale the portion of B annexed to A by X.

The effect of the adverse possession by X with regard to the lands of B was to make him a joint proprietor of B along with Y.

Ejectment—(Contd.).

- The plaintiff in an action in ejectment must succeed on the strength of his own title ; he cannot succeed, merely because the defendant may not be able to establish title to all the lands in his possession. *Balkantha Nath Rai Chaudhuri v. Basanta Kumari Dasl* ... 151
- Enhanced rent, how long subsists—Agreement for enhancement of rent at more than two annas in the rupee, if valid—Improvement effected ;
See Rent, enhancement of ... 209
- Enhancement—Rent in kind—Stipulation to pay fixed sum in case of default ;
See Money rent ... 635
- claimed for improvement—Basis for determination—Tenant's agreeing to pay certain rent ; *See Rent, enhancement of* ... 209
- claimed for improvement, what to include—Interest payable on capital spent—Bengal Tenancy Act, Sec. 30 cl. (c) ; *See Rent, enhancement of* ... 209
- Equitable estoppel—*Applicability to transactions before 1872—Hindu conveyances—Transfer of Property Act (IV of 1882), Sec. 43—Evidence Act (I of 1872), Sec. 115.*
- The equitable principle laid down in section 43 of the Transfer of Property Act is applicable to transactions before 1872.
- When a grantor, by a recital, is shown to have stated that he is seised of specific estate, and the Court finds that the parties proceeded upon the assumption that such an estate was to pass, an estate by estoppel is created between the parties and those claiming under them, in respect of any after-acquired interest of the grantor, the newly acquired title being said to 'feed the estoppel'. This principle of 'feeding the estoppel' is applicable to Hindu conveyances and to cases before the Evidence Act.
- Krishna Chandra Ghosh v. Rasik Lal Khan* ... 501
- Erroneous view of legal rights of parties—Civil Procedure Code, Sec. 100—
 Interference by High Court in second appeal ; *See Second appeal* ... 281
- Estate by estoppel—After-acquired interest of grantor ; *See Equitable estoppel* ... 501
- Estoppel—Admission by a person entitled to avoid a transaction—Transaction, if can be questioned by a stranger ; *See Title, proof of* ... 122
- , plea of—Estoppel depending on questions of fact—Proof ; *See Title, proof of* ... 122
- Evidence—Will—Trustworthy evidence of execution and sound disposing mind and suspicious circumstances ; *See Probate* ... 632
- , admissibility of—*Recitals in judgment not inter partes—Evidence Act (I of 1872), Secs. 11, 90—Ancient document—Authority of person making grant.*
- All judgments are conclusive of their existence, as distinguished from their truth ; judgments, as public transactions of a solemn nature, are presumed to be faithfully recorded. Every judgment is, therefore, conclusive evidence, for or against all persons, whether parties, privies or strangers, of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered ; in other words, the law

Evidence—(Contd.).

attributes unerring verity to the substantive as opposed to the judicial portions of the record.

The recitals in a judgment cannot be used as evidence in a litigation between other parties.

Section 90 of the Indian Evidence Act, does not prove the authority of the person who has made the grant, the genuineness whereof is presumed by the Court under the provisions of that section. *Kashi Nath Pal v. Raja Jagat Kishore Acharyya Chowdhuri* 583

Evidence Act, Sec. 3—Circumstances or conditions of probability; *See* Rent, enhancement of 209

————, Sec. 11—Recitals in judgment not *inter partes*; *See* Evidence, admissibility of 583

————, Sec. 24—*Confession—President of panchayet, if a person in authority—Misdirection—Jury.*

Accused was called before a *salish* (assembly consisting of the president of panchayet and others) which was summoned to consider the case that was being made against her, and on being told that the *salish* would compromise the matter, made a confession of her guilt. The Judge in his charge to the jury said "A confession made under these circumstances is not inadmissible, because (a) the members of the *salish* were not persons in authority, (b) the accused was not then charged with any offence":

Held, that this amounted to a misdirection to the jury, inasmuch as the president of the panchayet is a person in authority within the purview of section 24 of the Indian Evidence Act, and it should have been left to the jury to say whether there was any inducement, threat or promise in the case. The confession ought to have been placed before the jury with an explanation as to how they should value it having regard to the circumstances in which it was made.

The confession having been excluded from consideration, and there being no sufficient evidence on the record to prove any offence against the accused she was acquitted. *King-Emperor v. Aushi Bibi* 477

—, Sec. 65—Secondary evidence of public document, when admissible; *See* Secondary evidence 506

—, Sec. 65 (b)—Secondary evidence in the nature of admission by vendor—Sale of immovable property; *See* Title, proof of 122

—, Sec. 90—Ancient document—Authority of persons making the grants; *See* Evidence, admissibility of 583

————, Sec. 91—Oral evidence, if admissible—Vendee of immovable property, how to prove his title; *See* Title, proof of 122

Execution—Decree of High Court—Transfer, application for—Limitation; *See* Execution of Decree 641

Execution of Decree—Limitation, question of, to be decided by which Court—*Decree of High Court—Transfer, Application of—Limitation—Indian*

Execution of Decree—(Contd.).

Limitation Act (IX of 1908) Sch. I Art. 183—Revivor of Decree—Notice, issue of—Civil Procedure Code (XIV of 1882) Sec. 245 B.

It is for the executing Court to deal with the question of limitation.

Limitation runs under Art 183, Sch. I of the Limitation Act from the time when the right accrues, that is to say, from the date of the decree and not from any time when the decree-holder has an existing right.

The mere fact that the High Court transmitted its decree for execution to another Court does not show that it was of opinion that the execution was not barred.

Although a judgment-debtor does not contest a notice under order 21, R. 22 of the Code of Civil Procedure, he can put in objections when his property is attached.

An application for transfer of a decree does not amount to a revivor. Nor is a notice alone under Sec. 245 B of the Civil Procedure Code, 1882, when execution is sought by arrest of the judgment-debtor, a revivor.

<i>Chatterput Singh v. Daya Chand</i>	641
Execution proceedings—Order, effect of ; <i>See Res judicata</i>	55
Execution-purchaser, liability of, extent of—Rent payable by the judgment-debtor—Execution-purchaser, if can recover ; <i>See</i> Contribution, suit for	125
Executory gift over—Period of distribution—Indian Succession Act, Sec. 111 ; <i>See</i> Hindu Law, Will ;	169
Ex parte Decree—Dismissal for default— <i>Provincial Small Cause Courts Act, Sec. 17 Sub-sec. (1).</i>	
An applicant for an order to set aside an order of dismissal for default is not an applicant for an order to set aside a decree <i>ex parte</i> . <i>Yusuf Akram v. Arfan Ali Khan</i>	147
—Such decree, if can be impeached on the ground of fraud—	
Defence—Such defence, if can be raised for the first time in appeal ; <i>See</i> Ejectment, suit for	587
Ex parte decree, if to be set aside—Summons not duly served—Civil Procedure Code, O. 9 R. 13 ; <i>See</i> Summons, service of	183
Extrinsic evidence as to rate of payment, if admissible—Rate of payment for work done under a contract ; <i>See</i> Contract	177
Family settlement—One party secretly and fraudulently obtained probate of Will—Other party wanting to have it revoked—Payment of larger annuity, thus obtaining admission of the genuineness of will ; <i>See</i> Probate	82
—settlement, what is ; <i>See</i> Probate	82
'Feeding the estoppel', principle of, applicable to Hindu conveyances before 1872 ; <i>See</i> Equitable estoppel	501
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Goods, when to be rejected—Goods not in accordance with contract—Reasonable time ; <i>See</i> Contract	415
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Guarantor, if has right to control appropriation by customer or banker of moneys paid in ; *See* Surety 256

Guardian—Alienation of ward's property, when can be made—Need—Benefit of estate.

The power of the manager for an infant heir to charge an estate not his own is under the Hindu Law a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. But when, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. There is a distinction between a case of need and a case of benefit of the estate. The actual pressure on the estate, the danger to be averted, refer to a case of need, and the benefit to be conferred upon the estate in the particular instance is thus differentiated from the other category mentioned. The mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular transaction is "for the benefit of the estate."

A party filling a fiduciary character, like that of a guardian, is authorised to perform any act which is manifestly for the infant's benefit. *Krishna Chandra Chaudhuri v. Ratan Ram Pal* 432

Guardian-ad-litem, appointment of—Letters of administration case—Contentious case ; *See* Letters of administration 79

High Court, when can interfere in appeal under sec. 109A of the Bengal Tenancy Act—Erroneous view of legal rights of the parties ; *See* Second appeal 281

High Court General Rules and Circular Orders, Chap. XI, R. 45(e), Vol. I, p. 301 297

p. 301, interpretation of ; *See* Vakalatnama 297

Hindu Conveyances, before 1872—Applicability of principle of feeding the estoppel ; *See* Equitable estoppel 501

Hindu Law—Joint family property—Partition—Adopted son's share—Mita-kshara—Mayukha—Dattaka Chandrika, section 5, paras 24 and 25—*Adopted grandson shares equally with the natural-born grandson.*

In cases of the distribution of joint family property by partition an adopted son stands exactly in the same position as he would stand if he were a natural born son of his adoptive father subject to the qualification that if there be a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally-born legitimate son.

Dattaka Chandrika, section 5, paras 24 and 25 construed.

N, a Gujerati Hindu, subject to the Mita-kshara and Mayukha, died leaving two sons H and B. The former died leaving a widow G, who was pregnant, and the latter died leaving a widow M to whom he had given authority to adopt. G gave birth to a posthumous son, the respondent.

Hindu Law—(Contd.).

M adopted the appellant, who sued the respondent for partition of the joint family property :

Held, reversing the High Court, that the appellant was entitled to an equal share (one-half) with the respondent. **Nagindas Bhugwandas v. Bachoo Hurkissendas** 395

—, Resjudicata—Considerations for the Court in applying the Rule
See Resjudicata 621

Hindu Law—Will—Dayabhaga School—Construction—Executory gift over—Period of distribution—Indian Succession Act (X of 1865), section 111.

Under the Dayabhaga school of Hindu law a testator can attach to an authority given by his will to his widow to adopt a son to him a direction that her estate should not be interfered with or divested during her life.

Section 111 of the Indian Succession Act embodies the rule of construction of wills enunciated in *Edwards v. Edwards*. It has been considerably modified by later English decisions, and although the said Act has given it statutory force, the rule should be applied only to cases strictly coming within its scope and does not apply to the case where the testator mentions in his will the event on the occurrence of which the distribution is to take place.

The will of a Hindu governed by the Dayabhaga school of Hindu law after revoking all prior testamentary writings and appointing his wife as the sole executrix thereof proceeded as follows : "I hereby authorise my said wife to adopt Dattaka Putra. In case of death of an adopted son my said wife shall adopt one after another five sons in succession. If my said wife dies without adopting a son or if such adopted son predecease her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister Srimati Benodini Dasi who may be living at the time of my death."

There were two sons of the testator's sister living at his death. His widow, who had obtained probate of the will, adopted a son who predeceased her unmarried, and she herself died shortly thereafter :

Held, that the testator's estate vested in his widow as his legal representative and remained in her possession until her death ; that the estate, which was in the widow during her life, could pass only to the adopted son who survived her or in case of his death during her lifetime to his male issue if he left any ; and that on her death the gift over (which was expressly declared to take effect after her death) to the testator's nephews took effect and his estate passed to them.

Held, also, that the event on the occurrence of which the distribution was to take place was distinctly mentioned as being the death of the widow and the gift over to the nephews was not affected by section 111 of the Indian Succession Act. **Bhupendra Krishna Ghose v. Amarendra Nath Dey** 169

Hindu widow dying without progeny—Step-son—Adopted son of another wife—Sapindas of husband ; See Stridhan 372

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Subject to any agreement between the parties, interest is payable on money paid or advanced by one partner for partnership purposes beyond the amount of capital to which he had agreed to subscribe, as the advance is not an increase of its capital but rather as a loan. <i>Govinda Chandra Basak v. Haridas Basak</i> ...	148
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Judgment, if valid—Judge on leave—Judgment, delivery of—Difference— Reference - Civil Procedure Code, (Act V of 1908) section 98—Appeal— Letters Patent, clause 15.	
An appeal was heard by a Bench of two Judges, one of whom subsequently went on temporary leave ; while was so away from Court, his judgment signed by him was read out by his colleague who delivered at the same time a separate dissenting judgment :	
<i>Held</i> , that the judgments were valid in law and an appeal lay therefrom under clause 15 of the Letters Patent.	
A reference to a third Judge under Sec. 98 of the Code of Civil Procedure can be made only when the point of law on which the Judges have dis- agreed has been stated by both the Judges for purposes of the reference.	
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The Judicial Commissioner of Chota-Nagpur having been specially appoint- ed by the Local Government under section 264, cl. (viii), of the Chota- Nagpur Tenancy Act to deal in appeal with the revenue questions decided by an inferior Revenue Officer, is a Revenue Officer within the meaning of section 258 of the Act. <i>Tekalt Ganesh Narain Sahl Deo v. Maharajah Protap Udai Nath Sahl Deo</i> ...	118
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Lessor not a <i>de facto</i> landlord—Lessee not given possession—Trespasser, right against ; <i>See</i> Ejectment	563
Letters of administration, grant of—Contract for sale of land—District Judge not consenting to alienation—Contingent Contract—Contingency not happening ; <i>See</i> Specific performance	606
————— <i>Grant, order of—Minor heir not made party—Revocation proceeding—Guardian-ad-litem, appointment of—Contentious suit—Minor not being cited nor being properly represented, effect of.</i>	
A minor, if not cited nor properly represented in a probate proceeding, is entitled to come in and to have the will proved in a solemn form in her presence.	
It is the duty of a Judge, as soon as he is informed of the existence of the minor heir of the deceased in the letters of administration proceeding, to issue notice upon the minor and to have a guardian-ad-litem appointed for her.	
A revocation case is quite a separate case from the probate or letters of administration proceeding.	
If a guardian-ad-litem had been appointed in the letters of administration case, it would have been the duty of the Court to proceed with the case as a contentious case in the presence of the minor represented by the guardian-ad-litem. In that case fresh evidence would have had to be taken and an order made upon the contention. A representation of the minor in the revocation proceeding is not effective for the purpose of making an <i>ex parte</i> order in the letters of administration proceeding for the grant, an order in solemn form. <i>Nabagopal Goswami v. Srigopal alias Ramgopal Bhattacharjee</i>	79
————— case—Guardian-ad-litem, appointment of—Contentious case ; <i>See</i> Letters of administration	79
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Liability, discharge of—Dealings, prejudicial—Contract Act, Secs. 133, 139 ; <i>See</i> Surety	256

Lien—Attorney and client—Attorney discharging himself—Retention of papers.

In the absence of proof of a special agreement between the solicitor and the client as to the mode of payment of the fees or the conduct of the proceedings, the refusal of the attorney to carry on the proceedings till he was paid his expenses, operates as a discharge by himself.

An attorney is entitled, at least, to his lien, and if this is secured to him, he cannot claim to embarrass the proceedings by retention of the papers.

Per Sanderson, C. J.—An attorney, if he discharges himself, cannot claim to retain the papers when they are wanted by his former client for the purpose of continuing the litigation. The most he would be entitled to, would be to have his lien protected by an undertaking given by the new attorney.

Per Mookerjee, J.—In the event of a change of solicitors in the course of an action, the former solicitor's lien is not taken away, but his rights in respect of his lien are modified according as his discharge is by himself or, by his client.

A solicitor cannot be treated as finally discharged till the leave of the Court has been obtained. *Prabhulal v. Kumar Krishna Dutt* ... 326

Limitation—Application for revocation of probate—No acquiescence—Delay ;
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—Claim for reconveyance of a certain quantity of gold—Specific purpose not carried out—Limitation Act, Sch. I, Arts. 49, 115, 145 ;
See Depository, suit against ... 145

—*Limitation Act (IX of 1908), Schedule I, Article 120, applicability of—Injunction, prayer for—Entries in record of rights, effect of—Actual claim made on the strength of entry.*

Article 120, schedule I, of the Indian Limitation Act is applicable to suits for declaratory reliefs but not for declaratory reliefs with prayer for confirmation of possession and for injunction.

A prayer for injunction is a prayer for consequential relief quite as much as a prayer for confirmation of possession.

Entries in a record of rights adversely to a plaintiff do not affect his possession, though they may be used in evidence against him in a suit for declaration of title. Time does not begin to run against him till an actual claim is made on the strength of the entry in the record of rights. *Dina Nath Das v. Rama Nath Das* ... 561

—*Mortgage decree on consent—Time, running of—Personal decree—Civil Procedure Code (Act V of 1908), section 48, cl. (a).*

When there are two decrees in a suit, a preliminary decree and a final decree, for the purpose of clause (a) of sub-section (1) of section 48 of the Code of Civil Procedure, the two together must be taken to be a single and indivisible decree, the date of which is the date of the final decree. It is

Limitation—(Contd.).

the final decree which makes the preliminary decree operative and effectual and renders it enforceable in execution. *Shiba Durga Debi v. Gopi Mohan Saha* ... 573

—*Mustagiri lease of agricultural lands—Lease, not for agricultural purposes—Transfer of Property Act (IV of 1882), if applies to the lease—Suit for rent—Limitation—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 2—Indian Limitation Act (XV of 1877), Sch. II, Art. 116.*

The period of limitation applicable to a suit for arrears of rent due under a Mustagiri lease of agricultural lands, whether it is or is not for agricultural purposes, is that prescribed by the Bengal Tenancy Act, and not that provided by the Indian Limitation Act.

Per Richardson, J.—Where a lease relates to agricultural land but is not a lease for agricultural purposes, it is clearly governed by the Transfer of Property Act which is an Imperial Act, in respect of matters within the scope of that Act. In other respects, however, the relationship between the parties to such a lease may still be subject to the provisions of the Bengal Tenancy Act. *Rashbehari Lal Mondal v. Tilackdhar Lal* ... 111

—Right to assess revenue on lands held exempt from the public revenue—Claims by Government ; *See* Revenue, assessment of ... 506

—Revivor of decree—Notice, issue of, under the Code of Civil Procedure ; *See* Execution of decrees... 641

Limitation Act, (1908), Sch. I, Arts. 30, 31, 115—Goods sent for conveyance—Goods not reaching the consignee ; *See* Suit for recovery of price with compensation ... 547

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—, (1908), Sch. I, Art. 120, applicability of—Suit for declaratory relief with prayer for confirmation of possession and for injunction ; *See* Limitation ... 561

—, (1908), Sch. I, Art. 145—Claim for reconveyance of a certain quantity of gold—Specific purpose not carried out ; *See* Depository, suit against ... 145

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—, (1908), Sch. I, Art. 183—Existing right—Twelve years, calculation of ; *See* Execution of decree ... 641

—, (1908), Sch. I, Art. 183—"Revivor," meaning of—Application for transmission of a decree, if a revivor ; *See* Decree, execution of 645 ; 641

Magistrate, jurisdiction of—Failure to observe preliminary procedure—Owner required to execute work—Bengal Municipal Act, Secs. 175, 178, 179, 202 ; *See* Procedure ... 598

Mandatory enactments, if and when directory ; *See* Corporate body ... 26

Meane profits, assessment of—*Civil Procedure Code, O. 20, R. 12, Scope of—Previous decision, if bars a suit by a pro-forma defendant for meane profits for subsequent period.*

Mesne profits—(Contd.)

Order XX, rule 12 of the Code of Civil Procedure does not contemplate anything except the relation between the plaintiff and the defendant in the suit, and there is nothing to suggest that it applies between co-defendants.

A decision, therefore, passed in a proceeding under order XX, rule 12 of the Code as regards the assessment of mesne-profits cannot bar a subsequent suit by a *pro-forma* defendant (in the previous suit) for recovering damages in respect of the period subsequent to the assessment of damages in the former suit. *Surendra Narayan Mitra v. Dilendra Prosad Mitra* 215

Minor, compromise on behalf of—Civil Procedure Code (1882), Sec. 462—

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——, not cited nor properly represented, effect of—Probate proceeding—

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fession by jury ; *See* Evidence Act, Sec. 24 477

Mofussil Courts, duty of—Subsequent acceptance of Vakalatnama, how to be made ; *See* Vakalatnama 297

Money paid to Court, if ceases to be payee's money ; *See* Suit, maintainability of 163

—— paid under legal process—*Bona fides* of party receiving money—

Money paid, if ceases to be payee's money ; *See* Suit, maintainability of 163

—— paid under legal process, if and when recoverable ; *See* Suit maintainability of 163

Money rent—*Kabuliat*—*Rent in kind*—*Stipulation to pay fixed sum in case of default*—*Enhancement*—*Bengal Tenancy Act (VIII of 1885), Sec. 29.*

Where an occupancy *raiyat* held lands at a money rent of Rs. 3-4 as. per annum, and then executed a *kabuliat* by which he agreed to hold the same lands at a fixed produce rent of 12 Batuas of paddy or in lieu thereof, 12 rupees :

Held, that the *kabuliat* could not be enforced inasmuch as it violated the provisions of section 29 of the Bengal Tenancy Act. *Sheikh Tarap Ali v. Kalipada Bandopadhyaya* 635

Mortgage—*Mortgage, if can be enforced for so much of the consideration as was paid*—*Transfer of Property Act (IV of 1882), Sec. 53*—*Purchaser of a portion of the mortgaged property, if can avoid the transaction.*

A mortgage can be enforced for so much of the consideration as is proved to have been paid by the mortgagee to the mortgagor.

Section 53 of the Transfer of Property Act does not render the transaction void ; it is only avoidable at the option of any person defrauded, defeated or delayed.

A purchaser of a portion of the mortgaged property can question the mortgage only in so far as it affects the property acquired by him. But the Court, when it proceeds to grant relief by way of avoidance of the tran-

Mortgage—(Contd.).

saction, will do so only on equitable consideration and will apply the principles of justice, equity and good conscience.

If, at the instance of the defendant, who is a purchaser of a portion of the mortgaged property subject to the lien of the plaintiff mortgagee, the mortgage is avoided, he should be granted relief, only on the condition that he satisfies that lien. *Krishna Kumar Nandi v. Jalkrishna Nandi* ...

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———, if can be enforced for so much of the consideration as was paid ;

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Mortgagee, suit by—Application for appointment of receiver—Court's duty ;

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201, 302 333

Mustafai lease of agricultural lands—Lease not for agricultural purposes, if governed by Transfer of Property Act ; *See Limitation* 111

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Objection, nature of—Plaintiff not to succeed on a case different from that set out in his plaint ; *See Pleadings* 429

Occupancy holding—Continuous realisation of rent at an illegal rate—Contract, enhancing rent at more than 2 as. in the rupee, if void—Holding,

* Overruled. Sec. 24 C. L. J. 235.

Occupancy holding—(Contd.).

division of—New Tenancy—Bengal Tenancy Act (VIII of 1885), Sec. 29 cl. (b), Proviso (1), Sec. 178 (1) (b).

Proviso (1) to section 29 of the Bengal Tenancy Act does not control cl. (b) of the section and continuous realisation of rent at an illegal rate is of no avail to the landlord when he seeks the assistance of the Court.

The tenants entered into a contract with the landlord by signing the rent-roll, for payment of enhanced rent exceeding 2 annas in the rupee. The contract was not registered :

Held, that the contract was wholly void.

Where it was found as a fact that the pre-existing holding was divided between two brothers of the tenant :

Held, that in the absence of an intention of the parties to that effect, the division had not the effect of creating new tenancies and thus of taking away the pre-existing occupancy rights.

That under Sec. 178 cl. (1) (b), the occupancy right in existence could not be taken away by the contract. *Nafar Chandra Pal Chowdhury v. Rahaman Sheikh* 580

—Non-transferable—Purchase by co-sharer landlord, effect of.

The voluntary transfer by the original raiyat is operative against the raiyat and all persons, other than the landlord including a subsequent purchaser from the same raiyat.

The fact that the purchasers are co-sharer landlords does not put them in a better position than a stranger purchaser would be. *Lala Deosaran Lal v. Bateswar Mondal* 559

Occupancy holding, non transferable, purchaser of a share of; *See Ejectment* 304

Occupancy raiyat—Land used for grazing purposes—Landlord and Tenant Procedure Act (VIII B.C. of 1869), Sec. 6—Land covered by jungle and not brought under tillage—Raiyat cultivating for more than 12 years under a landlord having no title, status of.

A land may be used for the grazing of cattle required for agricultural pursuits, or it may be used for the grazing of cattle required for avocations totally unconnected with agriculture. In the former contingency, but not in the latter, the holding is used for an agricultural purpose and a right of occupancy may be acquired therein.

The mere fact that a part of the land is still covered by jungle and has not been actually brought under tillage, does not take the case out of the operation of section 6 of the Landlord and Tenant Procedure Act, which applies to land 'cultivated or held.'

A raiyat who has occupied and cultivated land for more than 12 years under a landlord who has no title to the land, acquires a right of occupancy under section 6 of Act X of 1859 or Act VIII (B.C.) of 1869. *Brojobaal Koer v. Ram Sankar Das* 638

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— for issue of notice and injunction not to part with properties, if an order under O. 38 R. 5 C. P. C.—Application for attachment before judgment; <i>See</i> Appeal	392
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— refusing to remove a receiver already appointed, if appealable; <i>See</i> Receiver	217
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Partition—Adopted son's share—Adopted grandson and natural-born grandson; <i>See</i> Hindu Law—Joint Family property	395
— <i>Suit for partition by lessee against co-sharers of lessor, if maintainable.</i>	
Two properties A and B were jointly owned by X and Y. By mutual arrangement X held possession of A, while Y of B, but no final and definitive partition was effected between the parties. Y, though in possession of B, transferred to Z his one-half share in A;	
<i>Held</i> , that Z was entitled to claim partition as against X.	
A partition suit can include no property wherein each of the parties to the suit does not claim an interest. <i>Sris Chandra Datta Chaudhuri v. Mahima Chandra Datta Chaudhuri</i>	231
— suit—Suit by lessee against co-sharers of lessor; <i>See</i> Partition	231
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————, Sec. 153A—Code of Criminal Procedure (Act V of 1898), Sec. 108 (b), conviction under— <i>Intention, finding of, if essential.</i>	
Although to constitute an offence under section 153A of the Indian Penal Code there must clearly be an <i>intention</i> to promote feelings of enmity and hatred, but in order to justify an order under section 108 (b) of the Code of Criminal Procedure what is necessary to be found is that there are words used in the leaflet or matter complained of, which are likely to promote feelings of enmity or hatred ; and once those words are found to be present there is no necessity for finding an <i>intention</i> on the part of the accused. <i>Sital Prasad v. King-Emperor</i>	105
————, Sec. 153A, elements of ; <i>See</i> Penal Code, Sec. 153A : ...	105
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—, Secs. 201, 302— <i>Murder, causing disappearance of Evidence of—</i> <i>Principal, if can be convicted as an accessory after fact—Alternative</i> <i>indictment. propriety of.</i>	
Section 201 of the Indian Penal Code is an attempt to define the position known in England as that of an accessory after the fact. It is settled law that a principal cannot be convicted as an accessory after the fact.	
<i>Per Roe, J.</i> —Where it is impossible to say definitely, however strongly it might be suspected, that an accused was guilty of murder, mere suspicion is no bar to a conviction under section 201 of the Indian Penal Code.	
The accused were committed to the Sessions Court under section 302 and 201 of the Indian Penal Code ; and during the trial the charge under section 201 Indian Penal Code was first investigated ; the charge under section 302 Indian Penal Code being postponed for future consi- deration ; and they were convicted under section 201 Indian Penal Code :	
<i>Held</i> , that, if the facts found by the Sessions Judge were accepted it was beyond question that they amounted to a chain of circumstantial evidence amply sufficient to justify the conviction of the accused as principals ; and if they were not accepted the accused were on the merits of the case not guilty ; and as such the conviction could not be sustained.	
<i>Per Chapman, J.</i> —It is unsatisfactory to have an alternative indictment one count charging the accused as principal and the other as accessory after the fact. <i>Samanta Dhupl v. King-Emperor</i>	333

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—————, Sec. 201, conviction under—Suspicion—Accused guilty of murder ; <i>See</i> Indian Penal Code, Secs 201, 302	333
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<p>Two brothers, one being a pleader, had an execution case in the Court of Munsiff. On the date fixed for sale, the decree-holders found out that the sale proclamation had not been duly published. They applied for the issue of a fresh sale proclamation on the ground that the non-publication was due to the negligence of the Court officers. The Munsiff rejected it however and struck off the case. They caused a notice to be written and served on the Munsiff threatening him with legal proceedings to recover the costs. The learned Munsiff made a report to the District Judge, who instituted proceedings under section 14 of the Legal Practitioners Act against the pleader. The learned Judge asked him to apologise but he chose to stand upon his legal rights and did not. Thereupon he referred the matter to the High Court under section 14 of the Legal Practitioners Act holding that the pleader was guilty of grossly improper conduct in the discharge of his professional duty :</p> <p><i>Held</i>, that the reference should be discharged as the case was not within section 13 (b) of the Legal Practitioners Act.</p> <p><i>Per D. Chatterjee J.</i> : What was done in this case was done "by an individual in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor and it had no connection whatever with his professional character, or anything done by him professionally."</p> <p>The mere fact of filing a petition by a legal practitioner, ultimately turning out to be based on grounds which are not maintainable on a point of law, does not constitute on his part, an improper conduct within the meaning of section 14 of the Legal Practitioners Act.</p> <p><i>Per Beacroft J.</i> : That on the facts stated the Munsiff's order dismissing the execution case was wholly indefensible. Human nature being what it is, one must not view the action of the pleader too seriously. That having had time for reflection he should have offered an apology to the Munsiff.</p> <p>The impropriety of addressing anonymous complaints to Court in connection with pending litigation stated, <i>In the Matter of Purna Chandra Addy, Pleader</i></p> <p>—————, a party, threatening to sue Court for unwarrantable act—Notice based on error of law—Unprofessional conduct ; <i>See</i> Pleader</p>	
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Pleadings—Pleadings and proof, variance between, when fatal—Objection, form of.

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.

The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, *first*, to apprise the defendant, distinctly and specifically, of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise; and, *secondly*, to preserve the accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. Hence every variance between pleading and proof is not fatal.

The objection that the plaintiff should not be allowed to succeed on a case different from what he had set out in his plaint, should be one of substance and not one of form. *Hira Lal Chatterjee v. Giribala Debi* ... 429

— and proof, variance between, when fatal ; *See* Pleadings ... 429

Power of attorney—Construction—Excess of authority ; *See* Principal and agent 348

— of attorney—Transaction within authority—Principal not receiving any benefit from the transaction ; *See* Principal and agent ... 348

Presidency Towns Insolvency Act, Sec. 57, applicability of ; *See* Benamidar ... 463

President of panchayet, if a person in authority ; *See* Evidence Act, Sec. 24 ... 477

Principal, if can be convicted as an accessory after the fact ; *See* Indian Penal Code, Secs. 201, 302 333

—, liability of, deriving no benefit ; *See* Principal and agent ... 348

Principal and agent—Power of attorney—Construction—Excess of authority—Money-lending business—Liability of principal deriving no benefit—Promissory note—Guarantee by agent.

Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.

If it is established that the transaction in question is within the authority conferred by the power of attorney, the mere fact that the principal did not receive any benefit from the transaction does not rid him of his liability.

The defendant, a Chetty money-lender and financier, gave a power of attorney to an agent, who managed the entire business. The power gave the agent authority to borrow "either with or without pledge of the securities." The agent agreed with a constituent of the firm that the agent should pledge the firm's credit with the plaintiff bank to enable the constituent to have a cash credit account opened in his name and

Principal and agent—(Contd.).

obtain from the bank advances not exceeding in the aggregate a certain amount, and that to secure the due payment of this amount he should execute a promissory note in favour of the defendant's firm which the agent on his side should endorse over to the bank. A promissory note for the above-mentioned amount was executed by the constituent in favour of the defendant's firm, and was endorsed over by the agent to the Bank, to which the agent on behalf of his firm gave a letter of guarantee in respect of the transaction. The constituent became bankrupt and the bank brought the suit against the defendant who denied the agent's authority to enter into the transaction so as to bind his firm. It was proved that the agent had entered with the bank into a number of other similar transactions and the defendant had never raised the question that such transactions were in excess of the agent's authority. There was also evidence to show that what the agent did was in accordance with the practice among other Chetty firms doing the same class of business ;

Held, that both the constituent and the defendant's firm became severally liable on the note, one as the drawer, the other as the endorser, for advances to the constituent on his credit account ; that the agent had express authority to borrow in order to lend to others, and the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to constituents ; that with regard to the transaction in question it was a matter of convenience that the agent instead of receiving the money directly himself and lending it to the borrower (the constituent) authorised the lender (the bank), on the pledge of the firm's credit to advance the money to the borrower, and that the authority to enter into transactions of the nature in dispute was to be found in the power of attorney (in this case) itself by necessary implication from the nature of the business, with the general management of which the agent was entrusted. **The Bank of Bengal v. Ramasathan Chetty**

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— and agent—*Purchaser to be secured within a fixed time—Contract, when completed—Brokerage—Burden of proof—Duties and function of appellate Court.*

A person gave a letter signed by him to his broker in the following terms :
 " I agree to allow you to sell my above oil mill at Rs. 40,000 only. You will get brokerage 5 per cent. on the same when the mill will be sold through you. This condition to be in force till a fortnight (15 days) from date. On the sale proceeds being received in hand, brokerage will be paid" :

Held, that whenever or in what way the sale was concluded, the purchaser at such sale should be secured by the broker within fifteen days of the agreement.

Per Sanderson C. J. : In order to entitle an agent to receive his remuneration, he must have carried out that which he bargained to do or at any rate must have substantially done so and all conditions imposed by the contract must have been fulfilled.

Principal and agent—(Contd.).

That the brokerage was to be paid when the sale proceeds were received and the commission was payable if the sale proceeds were partly in cash and partly in *hundis*.

Per Woodroffe and Mookerjee, JJ: The onus of proving that the conditions of the contract were complied with, was on the plaintiff.

Per Mookerjee, J.: Where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not; consequently, where an agency for sale has expired by express limitation, a subsequent execution thereof is invalid, unless the term has been extended.

Per Sanderson, C. J.: Where the matter depends to a large extent upon the verbal evidence of the witnesses, the Court of appeal should not interfere with the decision of the primary Court save on very clear grounds, in other words, unless it is clear that a miscarriage of justice has taken place.

Per Woodroffe, J.: If, after argument, the Court has a conviction that the judgment under appeal is erroneous, it should not be affirmed and this is not the less so because the judgment raised a question of fact.

Per Mookerjee, J.: The burden lies upon the appellant to satisfy the Court that the finding he assails, is not supported by the evidence on the record. When such evidence consists entirely or even principally of the oral testimony of witnesses, the appellant is at a special disadvantage.

Duties and function of appellate Court in reversing a conclusion of fact by the primary Court pointed out. *Lalljee Mahomed v. Daddabhai Jivanji Guzdar* 190

— and agent—Unauthorised fraudulent act of agent—Master's benefit; *See Damages, suit for* 225

Probate—Application for revocation—When to be made—Reversioner if can apply—Acquiescence—Delay—Compromise—Family settlement—Will, thirty years old, proof of.

Although there may not be a fixed time within which an application for revocation of a probate may be made and although there may not be acquiescence, a person may be debarred by long delay in making such an application.

A reversioner can apply during the lifetime of the widow, for a revocation of the will.

The rule that a will more than thirty years old may be read in evidence without proof of its execution, is inapplicable to proof of a will in the probate Court.

There is a distinction between a case where the acquiescence alleged occurs while the act acquiesced in, is in progress, and another, where the acquiescence takes place after the act has been completed. In the former case, the acquiescence is quiescence under such circumstances as that assent may be reasonably inferred from it. In the latter case when the act is completed without any know-

Probate—(Contd.).

ledge or without any assent on the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him, and mere delay to take legal proceedings to redress the injury, cannot, by itself, constitute a bar to such proceedings, unless the delay on his part, after he acquired full knowledge, had affected or altered the position of his opponent.

A compromise amounting to a *bona fide* settlement of disputes binds the reversioners quite as much as a decree on a contest. This rule is subject to the qualification that the compromise was made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner.

A family settlement presupposes that there are *bona fide* claims on either side and an honest settlement after full disclosure of facts on either side.

Where one party secretly and fraudulently obtained probate of a will and the other party wanted to have it revoked, the former agreed to pay a larger annuity, and obtained an admission of the genuineness of the will which might be used against the reversioners :

Held, that under the circumstances, the principle of family settlement did not apply. *Shyam Lal Ghosh v. Rameswari Bosu*

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— *Will—Validity—Principles to be followed in determining validity—Trustworthy evidence of execution and sound disposing mind and suspicious circumstances.*

When a will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of will that the man ought, in the opinion of the Court, to have made. Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him, and it is not for any Court to try and discover whether a will could not have been made more consonant either with reason or with justice.

Where the last page of a will had the writing inconveniently crowded above the signature of the testator and the last page but one had also at the foot of the page writing so placed as to lend colour to the suggestion that the page had been filled up after the signature had been attached, and the evidence of the doctor, who was one of the attesting witnesses, showed that he saw the will signed by the testator and that the testator was perfectly capable of understanding a business transaction and understood what he was doing at the time he executed the will :

Held, that it would be most unsafe and undesirable to try to spell out from the peculiar form in which the document written in the vernacular appeared a hypothetical answer to the clear, distinct, and trustworthy evidence of the doctor, and that the will was a valid testamentary document. *Suna Ana Arunachellam Chetty v. S. R. M. Rameswami Chetty*

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Probate—(Contd.).

—, grant of—Declaration of reversionary interest—Suit, maintainability of; *See* Suit, maintainability of ... 621

— Court, if can direct executor to make full discovery of the assets of the deceased by an affidavit; *See* Probate Court, power of ... 480

Probate Court, power of—Court, if can direct discovery of the assets of the deceased,—Discovery—Civil Procedure Code (Act V of 1908), Order XI—Interrogatories.

Order XI of the Code of Civil Procedure applies to proceedings in probate, and as such a probate Court can direct an executor to an estate to make a full discovery of the assets of the deceased by an affidavit sworn by himself. The affidavit can, however, only be obtained by delivery of interrogatories, and until the interrogatories are filed the Court is absolutely without any power whatever in the matter. *Anila Bala Dasal v. Rajendra Nath Datal* ... 480

— proceeding—Minor, not cited not properly represented, effect of—Will to be proved in solemn form; *See* Letters of administration ... 79

Procedure—Owner required to execute work—Bengal Municipal Act (III B.C. of 1884), sections 175, 178, 179, 202—Preliminary procedure—Failure to observe—Jurisdiction of Magistrate.

There are two distinct stages in the preliminary procedur^e when an owner is required to do a certain thing by the Municipal authority; there is first the initial notice under section 175 of the Bengal Municipal Act, followed by objection, if any, on the part of the person notified and there is next the explanation or notification of the order absolute, if any made after his objection had been heard. This procedure is, by virtue of section 175 applicable in its entirety to a case under section 202.

Proceeding before a Magistrate on application under section 202, is without jurisdiction, when there is a failure to observe the essential preliminary steps due to non-compliance with provisions of sections 178 and 179.

Nabin Chandra Aich v. Noakhali Municipality ... 598

Proceedings not *inter partes*; *See* Admissibility in evidence ... 578

Promissory note—Guarantee by agent; *See* Principal and agent ... 348

Provincial Insolvency Act, Sec. 27—Consent of all creditors, if sufficient; *See* Adjudication order, annulling of ... 220

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Provincial Small Cause Courts Act, Sec. 17, Sub-sec. (1)—Application for an order to set aside a decree *ex parte*—Application for an order to set aside an order of dismissal for default; *See Ex parte* decree ... 147

—, Sch. II, Art. 41—Suit for contribution by a sharer in joint property—Second appeal, if lies; *See* Contribution, suit for ... 125

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Purchaser in execution of a mortgage decree, of a share of a dwelling house belonging to an undivided family—Purchaser, not a member of the family—Purchaser's right as to possession; <i>See</i> Ejectment, suit for ...	587
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—, subsequent, effect of—Notice to quit given by unauthorised person; <i>See</i> Ejectment	453
Receiver— <i>Appeal, if lies—Order refusing removal of receiver—Joint receivers— Retirement of one, effect of.</i>	
No appeal lies against an order refusing to remove a receiver who has already been appointed.	
Where two persons were appointed joint receivers to an estate, the retire- ment of one of them would not make the order appointing the receivers come to an end, and the estate would not be without a receiver and without the protection for which a receiver is, in fact, appointed. The Eastern Mortgage and Agency Company, Ltd. v. Premananda Saha ...	217
— <i>Appointment of—Principle—Civil Procedure Code (Act V of 1908), O. 40, R. 1—'Just and convenient'—Discretion.</i>	
The words 'just and convenient' in O. 40, R. 1 of the Code of Civil Proce- dure mean that the Court should appoint a receiver for the protection of property or the prevention of injury, according to legal principle and not that the Court can make such appointment because it thinks conve- nient to do so. They confer no arbitrary and non-regulated discretion on the Court.	
It is no ground for the appointment of a receiver that allowances payable to beneficiaries under the deed of wakfnama were not paid from the time the defendant took possession of the properties as mutwall in the absence of any allegation of waste or mismanagement. If it is found that the estate is in danger, because no longer properly managed, or that difficul- ties have arisen in connection with litigation about the properties comprised in the estate, or that there is good ground to apprehend that the defendant may mis-apply trust funds, the Court may properly appoint a receiver. Nawab Khajah Hobibullah v. Khajah Abtlakullah ...	567

Receiver—(Contd.).

————— Court, if can authorise receiver to ascertain facts and report—Interest of justice ; <i>See</i> Appeal	553
————— Mortgage, suit by—Court's duty—Hindu widow—Reversioner—Provisional appointment.	
When a mortgagee applies in his suit for appointment of a receiver, the primary question for consideration is, what steps should be taken to protect the mortgagee.	
Under the circumstances of the case, the receiver was directed to take possession only in the event if the mortgagor fail to carry out the undertaking to deposit the Government revenue, instalment by instalment, at least 7 days before the date fixed for the payment thereof. <i>Gobind Rani Dasl v. Brinda Rani Dasl</i>	
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Relationship of landlord and tenant—Bengal Tenancy Act, Sec. 153 (b)—Suit for rent valued less than Rs. 50 ; <i>See</i> Appeal	235
Rent, arrears of, suit for—Rent due under a mustagiri lease of agricultural lands—Bengal Tenancy Act ; applicability of ; <i>See</i> Limitation	111
————, enhancement of—Improvement by landlord—Bengal Tenancy Act (VIII of 1885), Sec. 29, Provisos (1), (2), Sec. 30 (c)—Sum in addition of interest—Damages, claim for.	

Section 3 of the Evidence Act lays down a rule of common sense. It expresses the rule in terms which allow full effects to be given to circumstances or conditions of probability or improbability.

The requirements of the first clause of the proviso to section 29 of the Bengal Tenancy Act are fulfilled if two elements are proved, namely,

Rent—(Contd.).

first, that there was an agreement to pay rent which is higher than the previous rate, and, secondly, that rent has been paid at a higher rate.

The enhancement of rent claimed for improvement under clause (c) of section 30 of the Bengal Tenancy Act should include a sum in addition to the interest payable upon the capital spent.

The tenants agreeing to pay certain rent per bigha in consideration of the improvement, may be taken *prima facie* as their own estimate of what would be fair under section 30 clause (c) of the Bengal Tenancy Act; and the Court might well adopt this as the basis for a decree, till, at any rate, the tenants showed that their estimate was erroneous.

Where improvement has been effected, an agreement for enhancement of rent at more than two annas in the rupee is valid. But this enhanced rent can continue only so long as the improvement exists and substantially produces its estimated effect in respect of the holding.

The claim for damages in this case was negative. *Ganes Dutt Singh v. Lachmi Narain Singh* 209

Res judicata—Suit for rescission of a decree—Effect of order in execution proceedings—Fraud.

Where the plaintiffs sued for a declaration that they were no party to a mortgage decree which was passed *ex facie* against them, and it appeared that on the application of the decree-holder to make the decree absolute the plaintiffs preferred objections thereto which were disallowed: *Held*, that the plaintiffs raised or ought to have raised all the points now raised in the execution proceedings, and their suit was *res judicata*.

Held, also, that the plaintiffs' suit was a suit for the rescission and destruction of a former decree of a competent Court and such rescission and destruction could be obtained on the ground of fraud practised on the Court, but there being no fraud the suit must be dismissed. *Rajwant Prasad Pande v. Mahant Ram Ratan GIr* 55

—*Res judicata and Hindu law—Considerations for the Court in applying the rule.*

Though the rule of *res judicata* of the Code of Civil Procedure may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators, and so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law. *Sheoparsan Singh v. Ramnandan Prasad Narayan Singh* 621

—*Withdrawal of suit, order for—Inability to adduce all the evidence at the first hearing—Jurisdiction—Civil Procedure Code (Act XIV of 1882), section 373.*

Where the appellate Court allowed the plaintiff to withdraw from the suit on the ground that he had not been able to adduce all the evidence which he would have liked to adduce at the first hearing:

Held, that such order not being contemplated by section 373 of the Code of Civil Procedure, was without jurisdiction and a fresh suit brought in

Resjudicata—(Contd.).

pursuance of that order was barred by *res judicata*. *Kall Prasanna Sili v. Panchanan Nandi Chowdhury*

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Respondent, when can urge cross-objection against another respondent; *See* Corporate body

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Restitution—Civil Procedure Code (Act X of 1877), section 583—Decree for redemption reversed on appeal—Jurisdiction of the Court to which application for restitution is made to award mesne profits not given by the decree of the appellate Court.

A mortgagor obtained a decree for redemption of a usufructuary mortgage from the Court of first instance, and in execution of that decree he was put in possession of the mortgaged property on payment of the decretal amount to the mortgagee. On the mortgagee's appeal the High Court increased the amount payable on redemption by a sum which the mortgagor failed to pay. The mortgagee, thereupon, applied to the Court of first instance for possession and also for mesne profits for the period during which he was out of possession :

Held, affirming the High Court, that the Court of first instance had jurisdiction under section 583 of the Code of Civil Procedure, 1877, not only to make restitution by restoring possession, but also to award mesne profits although the decree of the High Court had not expressly given such profits; that if the order giving mesne profits was wrong, the parties aggrieved had their remedy either by appeal to the High Court or by an application for revision; and that the proceedings taken under that order culminating in the sale at which the mortgagee purchased the equity of redemption were valid and the appellant, an assignee of the mortgagor's rights in the mortgage, was not entitled to maintain a suit to redeem it.

Pandit Parbhu Dyal v. Kalyan Das 411

—, application for, where to be made—Appellate Court, decree of, silent as to mesne profits—Decree for redemption reversed on appeal—Civil Procedure Code (1882), Sec. 583; *See* Restitution

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—, when can be had; *See* Corporate body

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Revenue, assessment of—Regulation II of 1805, section 11, sub-section (a)—Limitation—Date, from which limitation runs—Right of assessment, if barred—Assam Land and Revenue Regulation (I of 1886), section 28, proviso, Cls. 2 and 4, construction of.

Per Chatterjee, J. :—A right to assess revenue on lands held exempt from the public revenue will be barred unless claims on the part of Government be regularly and duly preferred, as provided by Regulation II of 1805, at any time within the period of 60 years from and after the origin of the cause of action.

Where the predecessors in title of the plaintiff claimed a lakheraj title to the land in dispute at the time of the Permanent Settlement in 1793, and the Government had to abstain from making a settlement, and where also it appeared that in 1842 there was a resumption of the land by the Revenue authorities, that is to say, a decision by the Revenue Board

Revenue assessment—(Contd.).

that the land was assessable to revenue, and the collector did not proceed to assess revenue :

Held, that 60 years having expired from either of the two dates the claim of the Government to assess revenue was barred.

Per Curiam : Clause (4) of the proviso to section 28 of the Assam Land and Revenue Regulation applied to the case, and as such the land having been held revenue-free for more than 60 years, the right of assessment was barred.

Per Chatterjee, J. : Clause (2) of the proviso to section 28 of the Regulation would authorise the assessment of lands excepted from the Permanent Settlement if they were not saved by any of the other exempting clauses of the Proviso. *Ananda Kumar Bhattacharya v. The Secretary of State for India in Council* 506

Revenue sale—Adverse possession—Sale of estate as it stood at the time of the permanent settlement ; See Ejectment, suit for 151

— sale—Joint proprietor of two estates—Adverse possession of one estate—Revenue sale of that estate, effect of ; *See Ejectment, suit for* ... 151

Reversioner, if can apply for revocation of will, during widow's lifetime ; See Probate 82

Review of order refusing revision—Decree made according to award—Order of reference made in the presence of all parties ; See Arbitration ... 130

Revision—Error of law ; See Civil Procedure Code, Sec. 115 557

Revivor—Decree, execution of—Application for transfer of decree—Notice—Limitation Act, Sch. I, Art. 183 ; See Execution of decree ... 641

— — Limitation Act, Sch. I, Art. 183—Application for transmission of decree—Notice—Civil Procedure Code (Act XIV of 1882), Sec. 248 ; *See Decree, execution of* 645

Revocation—Slightest act of tearing, if sufficient—Indian Succession Act, Sec. 57 ; See Will 314

— proceeding—Minor, representation of, effect of—*Ex parte* order ; *See Letters of administration* 79

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Right of appeal—Appellant to establish ; See Appeal 443

— of assessment, if barred ; *See Revenue, assessment of* 506

— to assess revenue on lands held exempt from the public revenue—Claims by Government—Limitation ; *See Revenue, assessment of* ... 506

Rights, enforceable, after cession against Sovereign—Agreement—Legislation ; See Cession 1

Rules of Supreme Court in England, O. 45, R. 5.—Enquiry ; See Suit, maintainability of 163

— 93 and 98, made under Sec. 138 (d) of Bengal Local Self-Government Act, if *ultra vires* ; *See Corporate body* 26

Sale of immovable property vested in a District Board, how effected ; See Corporate body 26

'Saleable', meaning of—Transferable by act of parties; See Civil Procedure Code (1908), Sec. 60 428

Second Appeal—*Bengal Tenancy Act (VIII of 1885), Sec. 109A, Sub-sec. (3) and proviso—Decision settling rent—Settlement of fair and equitable rent—Increase of area—Erroneous view of legal rights of parties—Civil Procedure Code (Act V of 1908), Sec. 100.*

When, in a proceeding under section 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-section (4) in accordance with the rules laid down in section 52, and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, a second appeal is not barred by section 109A of the Act. The High Court can interfere in an appeal under section 109A of the Bengal Tenancy Act, only if the decision of the lower appellate Court, involves an error of law. An erroneous view of the legal rights of the parties as determined by the contract entered into by the parties is liable to examination in second appeal. *Juanada Sundari Chowdhurani v. Amul Sarkar* 281

—*Civil Procedure Code (Act V of 1908), Sec. 100 (c)—Substantial error or defect of procedure—Deciding a case upon part only of the evidence—Commissioner's report, rejection of.*

A second appeal lies against the decree of the lower appellate Court on the ground of a substantial error or defect in the procedure which may possibly have produced error or defect in the decision of the case upon the merits when it is shown that the Court has decided the case upon part only of the evidence after rejecting the commissioner's report. *Tirthabasi Singha Roy v. Bepin Krishna Roy* 600

—*Maintainability of—Bengal Tenancy Act (VIII of 1885), section 153—"The amount claimed in the suit"—"Rent"—Suit claiming rent and damages for breach of contract.*

The bar provided in section 153 of the Bengal Tenancy Act cannot be evaded by the joinder of a claim for money with a claim for rent.

The expression 'the amount claimed in the suit' in Cl. (a) of section 153 of the Bengal Tenancy Act, has reference to the rent for the recovery whereof the suit has been instituted. The term rent may possibly include whatever is recoverable as rent under the provisions of the Bengal Tenancy Act as also sums ancillary to rent, such as interest on rent in arrears, or statutory damages for non-payment of rent.

A suit was brought for recovery of Rs. 82-8as. as arrears of rent and damages and of Rs. 50 as damages for breach of contract *i.e.*, for recovery of the sum of Rs. 132-8as. A decree was passed in favour of the plaintiff, which was confirmed on appeal :

Held, that a second appeal was barred under section 153 of the Bengal Tenancy Act, in so far as the claim for rent was concerned, and in respect of the claim for damages for breach of contract, a second appeal was equally barred under section 102 of the Code of Civil Procedure. *Jamadar Singh v. Raja Jagat Kishore Acharya Chowdhury* ... 557

Second appeal—No appeal from primary Court maintainable ; <i>See</i> Appeal ...	235
—————, if lies—Suit for contribution by a sharer in joint property— Provincial Small Cause Courts Act, Sch. II, Art. 41 ; <i>See</i> Contribution, suit for	125
Secondary evidence—Public document— <i>Indian Evidence Act, sec. 65.</i>	
<i>Per Beachcroft J.</i> : The rule laid down in section 65 of the Indian Evi- dence Act, that the only secondary evidence admissible of the contents of a public document is a certified copy thereof, is subject to the rule that when the original has been destroyed or lost any secondary evidence may be given. <i>Ananda Kumar Bhattacharya v. The Secretary of State for India in Council</i>	506
———— evidence in the nature of admission by vendor—Sale of immovable property—Evidence Act, Sec. 65 (b) ; <i>See</i> Title, proof of	122
———— evidence of public document, when admissible—Evidence Act, Sec. 65 ; <i>See</i> Secondary evidence	506
Security for costs— <i>Appeal from insolvency order—Jurisdiction of appellate Court—Civil Procedure Code (Act V of 1908), Sec. 117, O. 41, R. 10— Presidency Towns Insolvency Act (III of 1909), Sec. 8(b).</i>	
In an appeal against a judgment passed by the High Court in its insolv- ency jurisdiction, the appellate Court has power under section 117 and O. 41, R. 10 of the Code of Civil Procedure, to entertain and adjudicate an application by the respondent demanding security for costs from the appellant. <i>In re Goberdhone Seal</i>	24
Sentence defective in form— <i>Criminal Procedure Code (Act V of 1898), section 35, sub-section (1), scope of—Several sentences of different kinds—How to run—Sentences defective in form.</i>	
Section 35 of the Criminal Procedure Code covers cases of the description, where one of the punishments inflicted is imprisonment, while the other is transportation. It is not restricted to cases where the several punish- ments are all of the same kind, that is, are all sentences of imprisonment or all sentences of transportation.	
Omission to determine whether the sentences of imprisonment and transportation are to run concurrently or consecutively, makes the sentence defective in form. <i>Khohua Moran v. King-Emperor</i>	596
Service, if sufficient—Asking former attorney to accept service—Civil Proce- dure Code, O. 5, R. 12 ; <i>See</i> Summons, service of	183
———— of summons, not sufficient, if becomes sufficient by defendant's having knowledge of the institution of suit ; <i>See</i> Summons, service of	183
Shebait—Power given to invest ; <i>See</i> Will, construction of	241
Special text, construction of ; <i>See</i> Stridhan	372
Specific performance—Damages as alternative claim—Contingent contract— Contingency, not happening ; <i>See</i> Specific performance	606
———— Demand of return of deposit—Conduct consistent with intention to rescind ; <i>See</i> Corporate body	26
————— <i>Plaintiff, what to prove—Contract for sale of land— Subsequent variation of contract—Contingent contract—Letters of</i>	

Specific performance—(Contd.).

administration, grant of—District Judge not consenting to alienation—Damages.

Two Hindu ladies executed in favour of the plaintiffs a contract of sale and undertook to execute a conveyance on receipt of the price. The plaintiffs realised that such purchase was likely to involve them in serious trouble and with a view to fortify their position they induced their vendors to apply for letters of administration in respect of the estates held by them and to obtain the sanction of the District Judge to the intended alienation under section 90 of the Probate and Administration Act. The ladies accordingly applied for letters of administration at the instance of the plaintiffs, who also supplied the funds requisite for the conduct of the proceedings. The District Judge granted letters of administration, but ultimately declined to sanction the sale to the plaintiffs on the terms arranged. On the other hand, he sanctioned a sale in favour of the defendant who offered a higher price. In a suit for specific performance of the contract and in the alternative for damages :

Held, that the original contract was by implication varied by mutual consent, when, at the instance of the intending purchasers, the vendors agreed to obtain letters of administration, and was transformed into a contingent contract. As the contingency did not happen, the plaintiffs were not entitled to claim performance of the contract.

That as there was no breach of the modified contract by the vendors, the plaintiffs were not entitled to damages. *Kall Dassee Dassee v. Nobokumari Dassee* 606

—————Undue delay ; *See* Vendor and purchaser 358

Specific Relief Act, Sec. 42—Plaintiff not clothed with a legal character or title to any property—Suit not maintainable ; *See* Suit, maintainability of 621

Statement of decree-holder, if admissible as such a certificate of payment or satisfaction—Further proof, if necessary ; *See* Certificate 423

Statute, construction of—Court's duty—Interpretation put upon ; *See* Corporate body 26

—————, construction of—Mandatory enactment, if directory ; *See* Corporate body 26

—————, if retrospective—Part of the requisites of its action drawn from a time antecedent to its passing ; *See* Statute, retrospective effect of 506

—————, *retrospective effect of.*

Every legislation must be considered as prospective unless anything to the contrary is expressly or by necessary implication provided. But a statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing. *Ananda Kumar Bhattacharya v. The Secretary of State for India in Council* 506

Stridhan—Succession—Mitakshara school—Step-son—Adopted son of another wife—Dying without progeny—Special text, construction of.

Per Curiam : When a Hindu widow, governed by the Mitakshara school

Stridhan—(Contd.).

of law, dies without issue or progeny, and leaves stridhan property, her estate devolves on the sapindas of her deceased husband in accordance with paragraph 25 read with paragraphs 9 and 11 of Chap. II, Sec. XI of the Mitakshara. An adopted son of her husband taken in conjunction with another wife, and a son of her husband born of the womb of a third wife are sapindas of their deceased father in the same degree; consequently, they inherit the estate of their step-mother, in equal shares.

Per Mookerjee, J: A special text or statute forming an exception to a general text or statute should be construed strictly and applied only to cases falling clearly within it. **Gangadhar Bagla v. Hira Lal Bagla** ...

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Sub-division of holding—Division among tenants; See Occupancy holding ... 540

Subsequent acceptance of vakalatnama, how to be made; See Vakalatnama ... 297

Substituted service—Defendant not served personally; See Summons, service of ... 183

— service, requirements of—Civil Procedure Code, O. 5, R. 12; *See* Summons, service of ... 183

Succession—Mitakshara School—Step-son—Adopted son of another wife—Widow dying without progeny; See Stridhan ... 372

Suit, adjustment of—Arbitration, reference to—Agreement, enforcement of; See Civil Procedure Code, O. XXIII, R. 3 ... 482

—, if to be dismissed—Authority for institution, non-production of; *See* Corporate body ... 26

—, if to be dismissed—Plaintiff having no title; *See* Corporate body ... 26

—, maintainability of—Civil Procedure Code, O. 20, R. 12, decision under —Suit by *proforma* defendant for recovering damages—Period subsequent to assessment of damages in the former suit; *See* Mesne profits, assessment of... 215

—, maintainability of—*Money paid under legal process, if and when recoverable—Bonafides of party receiving money—Money paid, if ceases to be payer's money—Court's power to order money to be brought—Civil Procedure Code (Act V of 1908), section 151, O. 21, R. 46 and O. 21, R. 46 (3)—Rules of the Supreme Court in England, O. 43, Rr. 5, 6—Attachment of debt ostensibly payable to one not a judgment debtor—Necessity of enquiry—Judicial order to the detriment of a person.*

When money has been paid by the plaintiff to the defendant under compulsion of legal process which is afterwards discovered not to have been due, he cannot recover it back in an action for money had and received. There must be *bonafides* on the part of the party who has got the benefit of his opponent's payments. If the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the defendant will recover the money back.

Clause (3) of rule 46 of order 21 of the Code of Civil Procedure contemplates a case where there is no dispute that if the suit results into a decree against the defendant or if there is a pre-existing judgment against him, the money is recoverable thereunder from the depositor.

Suit—(Contd.).

No judicial order can be made to the detriment of a person till he has been afforded ample opportunity to defend his rights.

Rule (5) of Order 45 of the Rules of the Supreme Court in England contemplates, not an *ex parte* order to the prejudice of third persons, who may be really interested in the debt due from the garnishee, but an enquiry in the presence of all the persons interested.

The Civil Procedure Code does not contain any specific rule of the type of rules 5 and 6 of order 45 of the Rules of the Supreme Court in England. But the Courts in India have inherent power to guard against an abuse of its process and to ensure that its order do not operate to the prejudice of person who have no notice of the proceedings.

A sued B for recovery of money. On the same day, A obtained an order for attachment before judgment under rule 5 of order 38 of the Code of Civil Procedure. The property attached was a debt due ostensibly from C to D; but the debt was attached on the allegation that B and not D was the person beneficially interested in it. A prohibitory order was passed upon C. On the 13th August, 1909, A obtained an *ex parte* decree in his suit against B. C was then called upon to pay into Court the money due from him ostensibly to D. On the 8th October, C applied to the Court and intimated that he was willing to bring the money into Court, provided he was absolved from liability to pay a second time to D, and provided also that interest ceased to run upon his debt from that date. The Court thereupon ordered that the money, if deposited, would be detained in Court till the adjudication of the question whether B or D was beneficially interested therein. On the faith of this order, the money was brought into Court on the 13th December, 1909. Thereafter, without notice to C or D, the Court, on the application of A, paid out the money to him. D, who had no intimation of these proceedings, subsequently sued C and recovered judgment against him on the debt. C then brought a suit to recover the money deposited by him in court and which without notice to him or to his creditor D, had been withdrawn by A. It was found as a fact that D and not B was the real creditor of C:

Held, that the suit was maintainable. That it was incumbent upon the Court to make a conditional order of the description and to provide that the money deposited was not paid to the decree-holder till adjudication of the question of title to that property:

That the money did not cease to be the money of the plaintiff, merely because he had brought into court on the faith of a conditional order which directed its retention in court pending enquiry into the question raised.

That the Court had full authority to compel the defendant to bring back the money into Court to be paid to the plaintiff. **Harl Nath Chaudhury v. Haradas Acharyya Chaudhury**

—, maintainability of—Order for withdrawal of suit on the ground that the plaintiff was unable to adduce all the evidence at the first hearing—**Fresh**

Suit—(Contd.).

suit brought in pursuance of that order—Civil Procedure Code (1882),
Sec. 373; See *Res judicata* ... 489

—, *maintainability of—Specific Relief Act (I of 1897), S. 42—Declaration of reversionary interest while there is a will of a deceased Hindu,*

After the death of one B, a Hindu who left him surviving two widows, defendant R applied for probate of a will of the deceased wherein he was described as his Kartaputra. The plaintiffs opposed the application on the allegation that they were the next reversioners of the deceased. But the District Judge held that they had failed to prove their interest and ordered that probate be granted to R. Thereupon the plaintiffs brought the present suit against R. and B.'s widows for a declaration that they were the next reversioners to the estate of B. according to Hindu law, and as such, entitled to apply for a revocation of the probate :

Held, that the plaintiffs, while the will stood, as it must stand for the purposes of the present suit, were not clothed as required by S. 42 of the Specific Relief Act, with a legal character or title to any property which would authorise them to the declaratory decree sought by them, and that the suit should be dismissed as it was misconceived and incompetent.

Sheoparsan Singh v. Ramnandan Prashad Narayan Singh ... 621

—, *maintainability of—Suit on contract against an alien enemy—Civil Procedure Code (Act V of 1908) Secs. 9, 83—Internment, effect of:*

A suit for recovery of money for work done by a British Indian subject during war, is maintainable against an alien enemy under an order of internment, the contract having been made and the breach thereof having occurred during war. Such a suit can be tried before the restoration of peace.

The internment does not cut down the liability of an alien enemy.

Obiter: An alien enemy can be sued in British India, whether the cause of action arose before or after the war, and has every right to present his case before the Courts in accordance with the laws of procedure. *Abdul Qunder Khallifa v. Fritz Kapp* ... 493

—, *maintainability of—Summons, non-service of, effect of—Personal judgment against defendant, if can be set aside—Civil Procedure Code (Act V of 1908), O. 9, R. 5—Decree indivisible—Effect of order setting aside decree on prior suit.*

The law never acts by stealth, it condemns no one unheard, so that a personal judgment rendered against a defendant without notice to him or an appearance by him, is vitiated by the same infirmity as a judgment without jurisdiction. A judgment made under such circumstances may be set aside on the ground that the defendant must in essence be a party to the suit before the plaintiff can have judgment against him.

The first three defendants in the present suit, instituted a suit against the present plaintiff and the fourth defendant for dissolution of partnership, for adjustment of accounts, for appointment of a receiver and for other incidental reliefs. At that time the plaintiff, who was then the second

Suit—(Contd.).

defendant, was resident beyond the limits of British India, namely, at Somaser in Rajputana. The summons was sent to the Political agent at Rajputana. No attempt was made by him to serve the defendant, but the summons was returned to the Court. A decree was passed in that suit directing both the defendants to pay the plaintiff a certain sum with costs by six monthly instalments on the dates specified, subject to the proviso that if default was made in the payment of a single instalment, the plaintiffs would be at liberty to enforce the entire decree by execution :

Held, that the plaintiff's position in that suit in substance was the same as if no summons had ever been issued for service. Under these circumstances, a decree made against him could not bind him. That as the decree was indivisible and could not be set aside in part, the whole decree was set aside. The effect of the order was to discharge the entire decree in that suit and to revive it for retrial. That as the second defendant (that is, the present plaintiff) was not served, he would have to be served, unless he chose to enter appearance voluntarily. *Chatterjee Brahmin v. Durgadutt Agarwalla* 436

— by execution purchaser against judgment-debtor for recovery of possession, if maintainable—Civil Procedure Code, Sec. 47 ; *See* Ejectment, suit for 587

— by lessee against co-sharers of lessor, if maintainable—Partition suit ; *See* Partition 231

— claiming rent and damages for breach of contract—Civil Procedure Code, Sec. 102—Bengal Tenancy Act, Sec. 153 ; *See* Second appeal ... 557

— for possession—Purchaser in execution of *ex parte* mortgage decree—Representative of the mortgagor party to mortgage suit—Representative interested in his own right adversely to the mortgage in suit—Constructive *res judicata* ; *See* Ejectment, suit for 587

— for recovery of price with compensation—Goods sent for conveyance—Good not reaching the consignee—Notice to Secretary of State, if valid—Collector, if a proper person to receive notice—Indian Railways Act (IX of 1890), Secs. 77, 140—Limitation Act (IX of 1908), Sch. I, Arts. 30, 31, 115.

A notice served upon the Government through the Collector within 6 months of the delivery of goods for carriage by the Railway, is sufficient to satisfy the requirements of section 77 of the Indian Railways Act.

Section 140 of the Indian Railways Act does not mean that the manager is the only person on whom notice can be served, but that if notice is served on the manager, the only alternative being service on the Government it must be served on him in the manner provided.

A suit for the recovery of the price with compensation of goods consigned for conveyance to the Railway, which did not reach the consignee, is not governed by Art. 30 but either by Art. 31 or by Art. 115, Sch. I, of the Limitation Act.

Suit—(Contd.).

Per D. Chatterjee, J. : Such a suit is governed by Art. 115, Sch. I, of the Limitation Act.¹

<i>Per Beachcroft, J.</i> : <i>Quere</i> : Whether the Collector is a proper person to receive notice under section 77 of the Indian Railways Act on behalf of Government, when notice is served on the Government and not on the manager. <i>Radha Sham Basak v. Secretary of State for India in Council</i>	547
— on contract against alien enemy, if maintainable ; <i>See</i> Suit, maintainability of	493
— to enforce specific performance of contract—Limitation Act, Sch. I, Art. 43 ; <i>See</i> Corporate body... ..	26
— to set aside deed—Deed executed for good consideration—Preference by debtor to one creditor—Good faith ; <i>See</i> Debtor and creditor ...	406
Summons, non-service of, effect of—Personal judgment against defendant, if can be set aside ; <i>See</i> Suit, maintainability of	436
Summons, service of—Substituted service—Requirements of—Business premise—Service on outer door—Civil Procedure Code (Act V of 1908), O. 5, Rr. 12, 17, O. 9, R. 13.	

Per Curiam : In a case where the defendant has not been served personally, the requirements of the rules laid down in the Code of Civil Procedure for substituted service should be strictly observed in all respects.

The mere fact that the plaintiff's attorney writes to the defendant's attorney, who acted on a previous occasion, saying "will you accept service" and he receives no reply, is not sufficient service within the meaning of O. 5, R. 12 of the Code of Civil Procedure.

Merely going to a man's place of business on three separate days—a place of business where he carries on business with other partners, and where he may or may not be on these particular days or at the particular time of the day and merely asking for him, and then when he does not find him, posting a copy of the writ on the outer door of the premises, is not sufficient service. Proper enquiries, and real and substantial effort, and not perfunctory, should be made to find out when and where the defendant is likely to be found.

If the service of summons is not a sufficient one, it does not become sufficient by defendant's having otherwise knowledge of the institution of the suit.

Per Mookerjee J.—If the summons is not duly served, the defendant is entitled under O. 9, R. 13 of the Code of Civil Procedure to have the *ex parte* decree set aside as against him. *Kassim Ebrahim Saleji v. Johurmull Khemka*. 183

Surety—Liability, discharge of—Dealings, prejudicial—Contract Act (IX of 1878), Secs. 133, 139—Guarantor, if can control appropriation—New account, when to be opened—Departure from rule of appropriation—Agreement between principals with reference to contract guaranteed—Detention of money—Interest, liability to pay, after date of agreement.

Surety—(Contd.).

Per Sanderson, C. J. : The rule in *Clayton's case* applies only to the items in one current account and when there is no specific appropriation of the debtor.

Under section 139 of the contract Act, in order to discharge the surety, it must be shown that not only has the creditor omitted to do some act which his duty to the surety required him to do, but also that the eventual remedy of the surety himself has thereby been impaired.

A guarantor entered into an agreement with the Bank to the effect that he would pay to the latter on the 30th September, 1913, to the extent of Rs. 3,00,000, all money then due from B on current account or otherwise howsoever, including all interest, charges and other expenses, which he might charge against B :

Held, under the circumstances of the case, that the Bank could claim interest at the rate agreed upon between them and the debtor before the closing of the contract.

Held also by *Woodroffe and Mookerjee JJ.* : that the Bank could claim interest by way of damages for the detention of the money due to them at the rate agreed upon between them and the debtor before the closing of the contract.

Per Mookerjee, J. : In the absence of special agreement, a guarantor has no right to control the appropriation, by customer or banker of moneys paid in, subject to the qualification that the banker is bound to deal with the accounts in the ordinary way of business.

Thus, payments in may be appropriated to a pre-existing debt which is not covered by the security and of which the surety had no knowledge.

On the termination of the guarantee, the account may be closed and a new one opened to which all payments in may be carried, though the banker is not entitled, where an account is guaranteed to a limited extent, to split that account during the continuance of that guarantee and attribute all payments in to the insecured balance.

So long as an account is unbroken, a surety should not be prejudiced by any departure from the rule of appropriation of items in order of date (*Clayton's case*) unless his consent to such departure is expressed or can be implied from the character of his engagement.

It is contrary to ordinary business and good faith to open a new account during the currency of the guaranteed one and carry all payments in to the new account.

If there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and if there is any alteration, which is not obviously either unsubstantial or for the benefit of the surety, he is to be the sole judge whether he will remain liable.

A. K. A. Khan Ghuznavi v. National Bank of India Ltd. ... 256

Symbolical delivery of possession, effect of ; See Ejectment, suit for ... 587

Time, the essence of contract—Contract to sell land—Stipulation in the deed of contract for forfeiture of deposit and power given to resell, if contract not completed within a fixed time ; See Vendor and purchaser ... 358

Time—(Contd.).

—, the essence of contract—Time for completion fixed by the contract, effect of—Contract to sell land ; *See* Vendor and purchaser ... 358

— for completion fixed by the contract, effect of—Contract to sell land—Intention—Forfeiture of deposit and power to resell, if contract not completed within a fixed time ; *See* Vendor and purchaser ... 358

Title, if passes—Execution and registration of document—Fictitious transaction; *See* Benamidar ... 463

—, proof of—Registered deed, non-production of—Oral evidence, if admissible—Evidence Act (I of 1872), Secs. 65 (b), 91—Vendor's admission—Estoppel, plea of.

A vendee of immovable property under a registered deed, if required to prove his title, must do so by the production of the deed or lay the foundation for the admission of the secondary evidence with regard to it. No oral evidence of that sale can be adduced under section 91 of the Evidence Act.

When a transaction which is avoidable is admitted by the person, who is entitled to avoid it, it cannot be questioned by a third party.

Secondary evidence in the nature of admission by vendor as to sale of immovable property in favour of vendee, cannot, in the absence of conditions mentioned in cl. (b) of Sec. 65 of the Evidence Act, be admitted.

A plea of estoppel which depends on questions of fact, should be put clearly in issue. *Safar Ali v. Mohesh Lal Chowdhury* ... 122

—by estoppel, if can be claimed against official Assignee after adjudication ; *See* Benamidar. ... 463

—to land, if passes by admission—Statute requiring deed ; *See* Corporate body. ... 26

Transfer—Application to District Judge—Judicial Officer, allegation against—Transfer, order of—Notice to the judicial officer and opposite party—Order of transfer without such notice, if valid.

A District Judge cannot, upon a mere allegation of a party to a suit that a judicial officer presiding over a Court is interested in the case, direct the case to be tried by a different Court, without giving notice to that judicial officer, and the party interested in opposing the application. *Dwarka Nath Sen v. Tara Prasanna Sen* ... 295

—, order of—Judicial officer, allegation against—Notice to judicial officer and opposite party, effect of not giving ; *See* Transfer ... 295

Transfer of Property Act, Sec. 43, applicability of, to transactions before 1872 ; *See* Equitable estoppel. ... 501

—, Sec. 53—Suit to set aside deed as void—Deed executed for good consideration—Preference by debtor to one creditor—Good faith ; *See* Debtor and creditor. ... 406

—, Sec. 53—Transaction voidable ; *See* Mortgage. ... 570

Trust—Voluntary settlement—Trust estate—Mortgage—Trustee's power to create a charge, exercise of—Refund of payments made under an invalid

Trust—(Contd.).

mortgage—Practice—Compromise on behalf of a minor in a suit—Code of Civil Procedure (Act XIV of 1882), S. 462.

Where a trustee has power to create a charge on the trust estate the power must be exercised properly and reasonably and in the interest of the estate.

Where a mortgage on the trust estate given by a trustee is held invalid and not binding on the properties therein comprised on the ground that the trustee was not acting properly and reasonably and in the interest of the trust estate when he gave the mortgage, the mortgagee or a person claiming through him, to whom payments have been made under the mortgage, would be ordered to make repayments to the credit of the trust estate.

Held, that the trustee of the voluntary settlement in this case was not acting properly and reasonably and in the interest of the trust estate in undertaking to give in favour of the settlor a charge on the trust estate in consideration of the settlor giving his consent to postpone the payment of certain allowances to be paid under the trust deed to him and the members of his family, on the ground either that the trustee failed to prove that such consent was required under the terms of the trust deed or as a matter of fact, or that the settlor had prior to the said undertaking given his consent without consideration.

The provision in the Code of Civil Procedure (1882), S. 462, making it necessary to obtain the leave of the Court to an agreement or compromise on behalf of a minor by his guardian with reference to the suit, is of great importance to protect the interests of a minor, and in the absence of such leave such an agreement or compromise is invalid. *M. R. M. A. Subramanian Chettiar v. Rajah Rajeswara Doral*

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Trustee, having power to create a charge on the trust estate, how to exercise that power ; *See Trust*

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—of charity, if to spend whole of the income of charity every year ; *See Will, construction of*

241

Unlawful assembly, being a member of—Indian Penal Code (Act XLV of 1860), Sec. 143, conviction under—Code of Criminal Procedure (Act V of 1898), Sec. 106, order under—Findings necessary to sustain the order.

A conviction of an offence under section 143 Indian Penal Code of being a member of an unlawful assembly, does not necessarily amount to a conviction of 'taking unlawful measures with the evident intention of committing a breach of the peace' within the meaning of section 106 of the Code of Criminal Procedure. It does however involve an apprehension that a 'breach of the peace' may result. In order to bring the acts of the accused within either of these terms it is necessary that the Magistrate should expressly find that the acts of the person convicted amounted to this, or at all events that the evidence is so clear that without such an express finding a superior Court, such as a Court of revision, should be satisfied that the acts do involve a breach of the peace or an evident intention of committing the same. *Abdul Ali Choudhury v. King-Emperor*

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Unprofessional conduct—Legal Practitioners Act, Secs. 13 (b), 14—Pleader, a party to suit—Pleader, a party, threatening to sue for unwarrantable act ; See Pleader 237

Vakalatnama—Pleader, acceptance by—Acceptance, if to be in writing—Pleader subsequently appearing—Civil Procedure Code (Act V of 1908), O. III R. 4—High Court General Rules and Circular Orders, Ch. XI, R. 45 (e), Vol. I, p. 301, interpretation of.

Per D. Chatterjee, J. :—An appearance or act by a pleader named in the *vakalatnama*, if allowed by the Court expressly or by implication, would be valid and operative, as O. III R. 4 of the Code of Civil Procedure does not require that the acceptance of a *vakalatnama* should be in writing.

Rule 45 (e), Chap. XI, p. 301, Vol. I, General Rules and Circular Orders (Ed. 1910) of the High Court, requiring acceptance of a *vakalatnama* by endorsement in writing, should be complied with by the pleader in the Mofussil who first accepts it, as it is a salutary rule prescribed for safe-guarding the interests of litigants. All subsequent acceptances must be made by endorsements done in the presence of the Court or the *sheristadar* or the Bench officer and dated, provided all the pleaders so accepting a *vakalatnama* are named in it. Courts in the Mofussil should be specially careful in enforcing this rule in cases of compromise and withdrawal of cases and withdrawal of money and documents.

Per Beachcroft, J. :—Although there may be an acceptance, as between party and pleader, other than in writing, if the High Court Rules require that a pleader is to sign the *vakalatnama* or make any particular endorsement on it, the Court before which the pleader practises should insist on the rule being observed, before it allows him to plead.

Quere, whether after the first endorsement, a mere endorsement of acceptance is sufficient in the case of pleaders subsequently appearing.

Mohesh Chandra Addy v. Panchu Mudall 297

Vendee of immovable property, how to prove his title—Oral evidence, if admissible—Evidence Act, Sec. 91 ; See Title, proof of 122

Vendor and purchaser—Contract to sell land—Indian Contract Act (IX of 1872), S. 55—Time, the essence of the contract—Time for completion fixed by the contract, effect of—Specific performance—Undue delay—Intention—Forfeiture of deposit and power to resell, if contract not completed within a fixed time.

Where in a suit for specific performance of a contract to sell land, the issue is whether time is of the essence of the contract, the law applicable to the point is contained in the Indian Contract Act S. 55, which does not lay down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under English law, equity, which governs the rights of parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion

Vendor and purchaser—(Contd.).

was to take place, really and in substance intended more than that it should take place within a reasonable time. That section adopts and embodies in reference to sales of land that doctrine which is laid down in *Lennon v. Napper* ; *Roberts v. Berry* ; *Tilley v. Thomas and Stickney v. Keeble*.

The Court will apply the doctrine, if it can do justice between the parties, and if there is nothing in the express stipulation between the parties, the nature of the property or the surrounding circumstances which would make it inequitable to interfere with or modify the legal right.

The application of the doctrine may be excluded by any plainly expressed stipulation, if its language plainly excludes the notion that the fixed time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation.

The doctrine however will not be applied where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time.

The Court will infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract, the construction of which, however, cannot be affected by what takes place after it has once been entered into.

A stipulation in a contract of sale of land that should the purchaser not pay the balance of the purchase-money within the period therein fixed he was to have no right to the deposit paid on account, and any claim of his was to be void, and the vendor was, after the fixed date, to be at liberty to resell, was *held* not to make time of the essence of the contract
Jamshed Khodaram Irani v. Burjorji Dhunjibhai Contractor ... 358

Virangam Kasbati's tenure—Proprietary right—Fresh patta ; *See* Cession ... 1

Voluntary settlement, trustee of—Undertaking to give in favour of settlor a charge on the trust estate—Settlor giving consent to postpone payment of allowances to be paid under the trust deed ; *See* Trust ... 337

Ward's property, alienation of, when can be made ; *See* Guardian ... 432

Will—*Authority to adopt and disposition of property—Subsequent will—Doctrine of dependent relative revocation—Invalid alternative inconsistent disposition—Revocation.*

The application of the doctrine of dependent relative revocation is a question of intention which has to be ascertained from the language of the testator as found in his testamentary documents.

An alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property.

A., a sole surviving Hindu co-parcener, made a will appointing executors and containing a disposal of his property and an authority to his widow to adopt B., a son of his daughter, and in case of B's death during the widow's lifetime to adopt another of his daughter's sons. The testator

Will—*Contd.*.)

adopted B during his lifetime and thereafter made another will containing a new appointment of executors and a gift on B's death in favour of his sons. That will contained no words of revocation of the previous will, was wholly silent as to adoption and did not refer in any way by revocation or otherwise to the clause in the earlier will giving the widow contingent power to adopt. After the testator's death the first will was not and the second was admitted to probate, but subsequently the second will was decreed to be null and void and inoperative according to Hindu law on the ground that the property thereby disposed of was ancestral and at the time of making the will the testator had a coparcener (his adopted son B.) and could not dispose of it. Thereafter the widow adopted C, another son of the testator's daughter. It was contended that the first document was not a will and that if it was a will, it was revoked by the second will and that at the time of adopting C, no power existed in the widow to make an adoption :

Held, affirming the High Court, that the first document which contained an appointment of executors and was executed by a testator who at its date could dispose of the property of which he purported to dispose, was a will ; and that assuming that there was such an inconsistency between the two wills as that the provisions of the earlier will could not stand with the existence of the later will, the contention would affect only the part containing a disposal of the property and not the part giving a power to adopt, but that the disposition under the first will was not revoked by the subsequent invalid disposition of the same property under the second will and the contingent power to adopt in the earlier instrument was unaffected by anything in the later. *V. Vencatanarayana Pillay v. V. SubbamaI*

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Will—*Revocation—Tearing—Slightest act of tearing, if sufficient—Indian Succession Act (X of 1865), Sec. 57.*

By tearing in section 57 of the Indian Succession Act, is not meant a literal tearing to pieces ; the slightest act of tearing with intent to revoke the whole will thereby, is sufficient for the purpose.

Per Mohherjee, J.—A revocation of Will consists of two elements under section 57 of the Indian Succession Act, the intention of the testator and some outward act or symbol of destruction. A defacement, obliteration or destruction without the *animo revocandi*, is not sufficient. Neither is the intention, the *animo revocandi*, sufficient, unless some act of obliteration or destruction is done. What acts of tearing, burning, cancelling or obliterating are sufficient to constitute a total or partial revocation, must depend, to a considerable extent, upon the circumstances of each case. *Johar Lal De v. Dharendra Nath De*

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—Validity—Principles to be followed in determining Validity—Evidence ; See Probate •

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—, construction : of—Dedication to idols—Complete dedication or charge—

Will—(Contd.).

Surplus income arising from debutter estate—Accumulation—Power given to shebait to invest—Cash and money—Devise of residuary estate.

Held, on the construction of the will in question that there was a valid trust for religious and charitable purposes with regard to the surplus income arising from the *debutter* estate.

That the clause relating to accumulation was merely incidental to the provisions relating to the dedication and management of the property.

That a power was given to the shebait from time to time in the course of the management of the properties to make safe investment of surplus income and thus increase the *debutter* fund, and a direction was necessarily implied that the income not required for the specified expenses, should be used within a reasonable time and in a reasonable way or other religious ceremonies and other charitable work. It was left to the discretion of the shebait to decide the exact form and the exact time when the income should be so used.

The term 'cash' used by the testator in clause 12, did not include arrears of rent, debts due and the like properties.

Clauses 12, 13 and 14 of the will, contained a devise of the residuary estate to his two sons.

Per Sanderson, C. J. and Woodroffe J.—The word 'cash' in the ordinary acceptance of the term has a narrower meaning than money, and when taken in conjunction with the words 'Government Promissory Notes,' means cash in the ordinary meaning of the word.

Per Mookerjee J.—That clause 1 of the will constituted a complete dedication of all the property to the idols; it did not create merely a charge on the property in favour of the idols.

Where there is an unconditional gift to charity, a direction for accumulation is invalid.

The trustees of a charity are not bound to spend the whole of the income of the charity every year; they can lay by money for an ulterior purpose, just as an individual can, provided the purpose is within the scope of the charitable trust.

In case of doubt, one should so read the will as to lead to a testacy and not to an intestacy. *Sarojini Dassi v. Gnanendra Nath Das and Surendra Nath Das v. Gnanendra Nath Das* 241

—, proof of, in probate Court—Will, thirty years old; *See* Probate 82

—thirty years old—Proof of will in probate Court; *See* Probate 82

Written contract—Stipulation or undertaking, implied—Principle; *See* Contract 514

ERRATA.

Page 461 line 22 for "notice to suit" Read "notice to quit"

„ 557 margine for "Civil " Read "Civil "
1916. 1915.

„ 564 line 33 for "Jatindra Mohan Ghosh" Read "Jatindra Mohan
Chowdhury"

